IN THE MISSOURI COURT OF APPEALS,
WESTERN DISTRICT

STATE OF MISSOURI, *ex rel.* RYAN FERGUSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No.**
	)	
DAVE DORMIRE, Superintendent, Jefferson City Correctional Center,	)	
	)	
Respondent.	)	

PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW Ryan Ferguson ("Ryan"), by and through his attorneys, Kathleen T. Zellner, Douglas H. Johnson and Samuel Henderson, and petitions this Court to issue a Writ of Habeas Corpus pursuant to Missouri Rule 91 based on violations of Ryan's constitutional rights which enabled the State of Missouri to obtain a conviction and sentence totaling 40 years in the Missouri Department of Corrections against an innocent person. In support of this Petition, Ryan states as follows[1]:

[1] Kathleen T. Zellner and Douglas H. Johnson are out-of-state counsel and have represented Ryan since 2010. In 2010 they were admitted *pro hac vice* to represent Ryan in the appeal of the denial of his Rule 29.15 motion. In 2011 they were admitted *pro hac vice* to represent Ryan in the petition for writ of habeas corpus filed with the Circuit Court of Cole County. Ms. Zellner and Mr. Johnson will be filing motions for admission *pro hac vice* once the instant petition is filed. Mr. Henderson represents Ryan as local counsel.

SUGGESTIONS IN SUPPORT

I.

INTRODUCTION AND SUMMARY OF ARGUMENT

This habeas case presents the Court with an extraordinary set of facts that, when examined, force the conclusion that an innocent person has been unjustly convicted based on perjured witness testimony and the failure of the State to disclose exculpatory evidence.

On October 21, 2005, Ryan was found guilty by a jury of one count of second degree murder and one count of first degree robbery, and was subsequently sentenced to a total of 40 years' incarceration. The prosecution's case against Ryan was incredibly weak. As this Court has previously noted, no physical evidence links Ryan to the murder. *Ferguson v. State*, 325 S.W.3d 400, 419 (Mo. App. W.D. 2010). Rather, Ryan's conviction rests on the trial testimony of two witnesses – his co-defendant, Charles Erickson ("Erickson"), and Jerry Trump ("Trump"). *Id.* This Court, in examining the effectiveness of Ryan's trial attorney on appeal from the denial of his Rule 29.15 motion, concluded that Erickson's credibility had been severely undermined at trial. Specifically, this Court stated, "Erickson was subjected to a lengthy and extensive cross-examination, wherein Ferguson's trial counsel was successful in illustrating that Erickson had made various prior statements that seriously undermined Erickson's credibility." *Id.* at 417 (emphasis added).

Since that ruling it has come to light that Trump – the only other witness to offer any evidence connecting Ryan to the murder – perjured himself at Ryan's trial. On April

17, 2012, at an evidentiary hearing on Ryan's Rule 91 petition filed with the Circuit Court of Cole County, Trump testified that he lied when he testified at trial that he saw Ryan next to the victim's vehicle in the early morning hours of November 1, 2001. The Circuit Court, the Honorable Daniel Green ("Judge Green"), found that Trump committed perjury at the initial trial wherein he identified Ryan as one of the two individuals he saw that night.

At that hearing Erickson also admitted that he perjured himself at Ryan's trial. Specifically, Erickson testified at the hearing that he lied at Ryan's trial when he testified that he remembered he and Ryan perpetrating the murder. Erickson admitted that he has never had any memory of that night due to suffering a blackout from extensive drug and alcohol use.

As it stands, the only two witnesses supporting the prosecution's case against Ryan have been wholly discredited. Not only do these recantations support Ryan's freestanding claim of innocence, but they also establish the "gateway" of innocence that allows this Court to review Ryan's other claims of constitutional error. Specifically, this Court may review Ryan's claim that his right to due process was violated because at the time his jury was selected Lincoln County employed a program that allowed potential jurors to "opt out" of jury service by performing community service and paying a fee. Furthermore, Ryan is also entitled to relief based on the State's knowing use of perjured testimony, and numerous *Brady* violations, the cumulative effect of which denied him a fair trial.

After a full and fair review of the following facts and applicable law, Ryan respectfully requests that justice finally be served, his constitutionally tainted conviction be set aside and that he be released after serving almost 9 years for a crime he did not commit.

II.

STATEMENT OF JURISDICTION

Jurisdiction lies with this Court pursuant to Missouri Supreme Court Rule 91, and 508.010 R.S. Mo. (2000), in that Ryan is a prisoner in the State of Missouri, and is being held in the custody of Respondent within Cole County, Missouri, and service upon Respondent can be made within Cole County, Missouri.

III.

STATEMENT OF PARTIES

Ryan, # 1137593, is a prisoner of the State of Missouri, due to a criminal conviction. Ryan is being held at the Jefferson City Correctional Center, located at 8200 No More Victims Road in Jefferson City, Cole County, Missouri, 65101. Service can be made upon Ryan at this address.

Ryan is represented by Samuel Henderson, 2015 Bredell Avenue, St. Louis, Missouri, 63143. Service can be made upon Ryan's counsel at this address. Simultaneous with the filing of this petition, Kathleen T. Zellner and Douglas H. Johnson, of Kathleen T. Zellner & Associates, P.C., 1901 Butterfield Road, Suite 650, Downers Grove, Illinois, 60515, will be filing motions for admission *pro hac vice*. Service can be made upon Ryan's counsel at this address.

Respondent David Dormire ("Respondent") is employed by the State of Missouri as the Superintendent of Jefferson County Correctional Center, 8200 No More Victims Road, Jefferson City, Missouri, 65101. Service can be made upon Respondent at this address.

Respondent will be represented by the Attorney General's Office for the State of Missouri, Jeremiah (Jay) Nixon, P.O. Box 899, Jefferson City, Missouri, 65102. Service can be made upon Respondent's counsel at this address.

IV.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

1. Ryan is incarcerated in Jefferson City Correctional Center, located at 8200 No More Victims Road in Jefferson City, Cole County, Missouri. The Jefferson City Correctional Center is operated by Respondent. Respondent is restraining Ryan's liberty.

2. Ryan was charged in Boone County of felony murder in the second degree in violation of §565.021 RSMo. 2000, and robbery in the first degree in violation of §569.020 RSMo. 2000.

3. Prior to trial the parties agreed that due to publicity concerns, a jury would be drawn from Lincoln County and that the case would thereafter be tried in Boone County.

4. On October 21, 2005, following a five-day jury trial in the Boone County Circuit Court before the Honorable Ellen Roper ("Judge Roper"), Ryan was convicted of one count of second degree murder and one count of first degree robbery. On December

5, 2005, Ryan was sentenced to 30 years on the murder count and 10 years on the robbery count, to be served consecutively. (Pet. Exh. 115).[2]

5. On June 26, 2007, this Court affirmed the judgment and sentence on direct appeal. *State v. Ferguson*, 229 S.W.3d 612, 614 (Mo. App. W.D. 2007).

6. On November 14, 2007, Ryan filed a timely *pro se* Rule 29.15 motion. Valerie Leftwich of the public defender's office was subsequently appointed as Ryan's counsel. On March 3, 2008, Ms. Leftwich filed an amended Rule 29.15 motion asserting claims of, *inter alia*, *Brady* and ineffective assistance of counsel. An evidentiary hearing was held July 16-18, 2008.

7. On August 11, 2008, Ryan's appointed attorney filed a motion to reopen the evidence in the Rule 29.15 proceedings to present evidence that Ryan's jury was not selected in conformity with jury selection statutes. Specifically, at the time Ryan's jury was selected Lincoln County employed an "opt out" procedure that allowed otherwise qualified jurors to perform community service and pay a fee in lieu of jury duty.

8. On September 2, 2008, the motion court, the Honorable Jodie C. Asel ("Judge Asel"), determined that the jury selection issue raised by Ryan's motion was heard more properly as a petition for a writ of habeas corpus and transferred the motion to the Circuit Court of Cole County, Missouri, the Honorable Richard Callahan ("Judge Callahan").

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[2] The exhibits referenced are those offered at the habeas hearing by Ryan, which are also submitted with this Petition. To the extent any exhibits referenced were not offered at the hearing, they are sequentially numbered following the last numbered exhibit admitted at the habeas hearing. An Exhibit List is submitted with this Petition.

9. On December 15, 2008, Judge Callahan heard evidence in support of Ryan's motion, and on January 9, 2009, the court denied the petition. *Ferguson v. Dormire*, No. 08AC-CC00721. The petition was subsequently filed with this Court and denied without a written opinion on March 31, 2009. *In re Ferguson v. Dormire*, No.WD70818. The petition was then filed with the Missouri Supreme Court and denied without a written opinion on May 5, 2009. *In re Ferguson v. Dormire*, No. SC90095.

10. On June 12, 2009, Judge Asel entered findings of fact and conclusions of law overruling Ryan's Rule 29.15 motion. *Ferguson v. State*, No. 07BA-CV05888.

11. On August 31, 2010, this Court denied Ryan relief pursuant to his appeal of the judgment denying his Rule 29.15 motion. This Court also declined to review new evidence that Ryan's co-defendant, Erickson, had recanted his trial testimony, noting that Ryan could bring his claim in a petition for writ of habeas corpus. *Ferguson*, 325 S.W.3d. at 409. (*See also* Pet. Exh. 97).

12. On November 2, 2010, this Court denied Ryan's Motion for Rehearing and Transfer. His application to the Supreme Court was also denied. *Ferguson v. State*, No. SC91303.

13. On February 14, 2011, Ryan initiated the present state habeas corpus litigation by filing a Rule 91 petition in the Circuit Court of Cole County, Judge Green.

14. On March 25, 2011, while the petition was pending, Ryan filed a petition for writ of habeas corpus with this Court, challenging only the "opt out" procedure used to select his jury. On March 29, 2011, this Court denied the petition, stating, "the denial is without prejudice to Ferguson reasserting this issue in this Court subsequent to the

Circuit Court's disposition of the Petition pending there, or from seeking other appropriate relief."

15. On July 22, 2011, Judge Green denied Ryan's jury selection claim based on Rule 91.22 and §532.040 RSMo 2000. Judge Green subsequently ordered a hearing as to the other claims in Ryan's petition.

16. On April 16-20, 2012, the parties presented evidence at an evidentiary hearing. During the hearing Erickson and Trump both testified that their trial testimony implicating Ryan in the murder was false. The Court also heard testimony and received evidence regarding Ryan's *Brady* claims.

17. On October 31, 2012, Judge Green entered judgment denying Ryan's claims for relief. (Pet. Exh. 116).

18. Ryan petitions this Court for a writ of habeas corpus, bringing issues and evidence before the court that could not have been presented in his original Rule 29.15 motion for post-conviction relief as explained below.

19. Pursuant to Rule 91.04(a)(4), Ryan states that no petition for the relief sought based on his freestanding claim of actual innocence, knowing use of perjured testimony, or *Brady* violations has been made to any higher court. Further, with regard to the jury issue, Ryan states that no higher court has considered that claim in light of the evidence establishing the gateway of innocence that permits consideration of otherwise procedurally barred claims. Additionally, no higher court has considered the jury selection issue in light of *Preston v. State*, 325 S.W.3d 420 (Mo. App. E.D. 2010) and *State ex rel. Koster v. McCarver*, 376 S.W.3d 46 (Mo. App. E.D. 2012), which granted

post-conviction and habeas relief where the exact same method of jury selection was utilized.

B. STATEMENT OF FACTS

This case is about actual innocence. No direct evidence tied Ryan to the victim's murder. No physical evidence even placed him at the scene. The only circumstantial evidence against Ryan was the exhaustively impeached testimony of Erickson and the identification made by Trump. Both of those witnesses have now admitted that their trial testimony linking Ryan to the murder was false.

To aid this Court's resolution of the claims raised in this Petition, Ryan briefly summarizes the evidence elicited at the prior proceedings below.

1. The trial evidence

Kent Heitholt ("Heitholt") was murdered in the early morning hours of November 1, 2001 in the parking lot of the Columbia Daily Tribune. Heitholt sustained multiple injuries to his head from a round linear object, like a pipe or board. (TT 1406-15).[3] The testifying pathologist indicated that the injuries were the result of eleven separate strikes. (TT 1414-15). The hyoid bone had been fractured. (TT 1424-25). The cause of death was determined to be asphyxia caused by strangulation. (TT 1425-31). A mark around the victim's neck matched his belt buckle, which was found on the ground nearby along with part of his belt. (TT 1122-23, 1423).

[3] The prior proceedings are submitted with this Petition. The trial transcripts shall be designated "TT __", the Rule 29.15 transcripts shall be designated "PCTr. __," and the habeas hearing transcripts shall be designated "HH (witness) __." Depositions taken prior to the habeas hearing shall be designated "H.Dep. (witness) __."

Physical evidence was discovered at the scene. In addition to the fingerprints of Heitholt and his daughter, unknown prints were discovered on and in his car. (TT 1347). Two sets of bloody footwear impressions were located at the scene. (TT 1142-44). A hair found in Heitholt's hand, which did not belong to Heitholt, was never connected to any suspect. (TT 1182-1202, 1631-35, 1649, 1686).

Shawna Ornt ("Ornt") and Trump - custodians at the Columbia Tribune - were interviewed by police as possible witnesses. Both testified that they saw two white males standing by Heitholt's vehicle shortly before his body was discovered. (TT 933, 973). Trump was unable to provide a detailed description and told police he was not certain he could identify the individuals. (TT 1057). Ornt saw one of the individuals "really good" and worked with a sketch artist to generate two different composite sketches of the person she saw. (TT 934, 939-40, 942). Ornt described this person to police as muscular, but not stocky, having blond hair and in his early 20s. (TT 954-55).

The Heitholt homicide was covered extensively in the news (TT 434) and many details regarding the murder were reported in media accounts. Two years later an article appeared in the newspaper concerning the Heitholt murder, which remained unsolved. (TT 580). Erickson, who was a junior in high school at the time the crime was committed, read the articles and began to believe he was having "snapshot" memories of having committed the crime. (TT 576, 579, 582-84 709-10). Erickson would later testify that the memories were so distant they seemed dream-like. (TT 584).

In January, 2004, Erickson approached Ryan and informed Ryan he felt he was having "repressed" memories. (TT 588). The night Heitholt was murdered, Erickson and

Ryan had been at a bar in downtown Columbia. (TT 577). Erickson told Ryan he thought they had killed "the Tribune guy" that Halloween. (TT 588). Ryan told Erickson, "no, we didn't do that." (TT 588).

A few months later Erickson informed two other friends, Nick Gilpin ("Gilpin") and Art Figueroa ("Figueroa"), about the thoughts he was having. (TT 592-96). Erickson told them he felt he could be dreaming the whole scenario. (TT 627-28, 820). Gilpin went to the police. (TT 600). On March 10, 2004, Columbia police contacted Erickson and took him to the police station where he was interrogated by Detective John Short ("Short"). (TT 598-99).

Throughout his subsequent interviews with police it became apparent that Erickson could not remember basic details about how the crime was committed. The police resorted to "helping" Erickson remember what had happened.

During Erickson's first interview with Detective Short, Short told him that one of the two individuals told the cleaning lady to get help. (Pet. Exh. 20). During the second interview, Erickson told Short that he struck Heitholt one time. Short corrected Erickson, telling him that the victim was hit more than once and that there were "multiple, multiple, multiple contusions and strikes" on Heitholt's head. (Pet. Exh. 21, 21a at p. 26).

Short asked Erickson about "where you saw Ryan strangle this guy," and asked if Erickson knew with what the victim had been strangled. (Pet. Exh. 21a, pp. 20-21). Erickson told Short he thought it was a shirt or something. (Pet. Exh. 21a, p. 21). Short told Erickson he knew it wasn't a shirt; Erickson replied, "Maybe a bungee cord or something from his car. I don't know why he'd have a rope in his car." (Pet. Exh. 21a,

p. 21). Short informed Erickson that he knew for a fact that Heitholt's belt was ripped off his pants and he was strangled with his belt. (Pet. Exh. 21a, p. 21). Erickson replied, "Really?" and, "I don't remember that at all." (Pet. Exh. 21a, p. 21).

Short told Erickson that Heitholt's keys were missing. (Pet. Exh. 21a, p. 22). Erickson replied it was possible that Ryan took them. (Pet. Exh. 21a, p. 23). Short asked him, "it's possible that Ryan could have strangled this guy with his belt and got the keys and you not know it?" (Pet. Exh. 21a, p. 23). Erickson replied, "The man's belt? His own belt?" (Pet. Exh. 21a, p. 23). Asked again if that rang a bell, Erickson said, "Not at all." (Pet. Exh. 21a, p. 23).

Short filled in other aspects of Erickson's rendition of the crime. With regard to the "cleaning lady," Short asked Erickson, "[S]he says that somebody said, "Go get help." So that's probably you, right?" to which Erickson replied, "I guess, yeah." (Pet. Exh. 21a, p. 6). Erickson insisted that he actually threw up at the scene. (Pet. Exh. 21a, p. 13). Short told him, however, that no vomit was found. (Pet. Exh. 21a, p. 13).

Erickson repeatedly expressed uncertainty as to whether the memories he had were authentic. Erickson could not recall what Heitholt was doing in the parking lot; he told Short, "I could just be making assumptions." (Pet. Exh. 21a, p. 15). Erickson later told Short, "I might not even know what I'm talking about." (Pet. Exh. 21a, p. 23).

Following the interview, Detective Jeff Nichols ("Nichols") drove Erickson around downtown so that Erickson could show them where things occurred. (TT 602, 677, 1291). Erickson could not remember where he and Ryan parked that night when they went to the bar, By George. (Pet. Exh. 22, 22a at pp. 2-3). Erickson could not even

recall where the murder took place and asked Nichols, "Can you show me exactly where this happened?" (Pet. Exh. 22a, p. 5). Nichols proceeded to drive Erickson to the exact location of the murder, and even pointed out the exact space in which Heitholt's car had been parked. (Pet. Exh. 22a, p. 6). Erickson persisted in telling Nichols about his lack of memory, stating, "I don't remember most of what happened." (Pet. Exh. 22a, p. 7). Erickson thought they returned to the club afterwards, "If I'm even sure about this." (Pet. Exh. 22a, p. 7). Erickson told Nichols he thought he went directly to a certain intersection immediately after the crime; Nichols told him the footprints went around the building the other direction. (Pet. Exh. 22a, p. 8).

When he arrived back at the station, Erickson told Nichols, "I don't know. I mean, I don't even - It's just so foggy. Like, I could just be sitting here fabricating all of it and not know. Like I don't know. I don't." (Pet. Exh. 23, 23a). Asked about details the detective believed Erickson had provided, Erickson stated, "this is after reading the newspaper in October...And this is kind of put together with - I mean, I don't know if I'm just flipping out or whatever. But I mean, this is what I put together with what could've happened." (Pet. Exh. 23a, p. 5). Erickson continued, "I'm just kind of presuming what happened," and "I'm making presumptions based on what I read in the newspaper." (Pet. Exh. 23a, p. 5). Nichols responded by telling Erickson that he would not listen to his "gibberish," that Erickson's "hind end is the one hanging over the edge" and "it's you that's on this chopping block." (Pet. Exh. 23a, pp. 6-7).

Erickson testified against Ryan at trial in exchange for a lesser sentence. (TT 613). At trial Erickson testified that on Halloween night, 2001, he and Ryan met Ryan's

sister, Kelly, at a club called By George. (TT 504-07). One of Kelly's friends knew the bouncer, so he let them in even though Erickson and Ryan were only seventeen. (TT 507-09). After some time Erickson and Ryan left the bar because they had run out of money. (TT 515). Erickson testified that Ryan proposed they rob someone so the two could stay out longer. (TT 516-17). According to Erickson, Ryan retrieved a tire tool from the trunk of his car and handed it to him. (TT 519).

Erickson testified that as they walked down an alleyway off Providence he and Ryan saw Heitholt. (TT 520). Erickson and Ryan hid behind a dumpster enclosure until another person who had come out of the building got in his car and left. (TT 522). Erickson then stepped over the wall and hit Heitholt with the tire tool. (TT 525). Erickson kept hitting Heitholt; ultimately Heitholt went to his knees and then to the ground. (TT 525-26). Erickson said there was blood everywhere, including on the ground, himself and the car. (TT 526).

Erickson testified a lady came outside; as more people came outside, Erickson yelled, "This man's hurt, go get help," then he and Ryan briskly walked away. (TT 551-54). Erickson stated he had the victim's belt. (TT 557). Erickson and Ryan headed down Fourth Street, crossed Broadway and into Flat Branch Park. (TT 555-56, 559). According to Erickson, after he washed his hands off in the creek he and Ryan encountered Dallas Mallory ("Mallory") near the Phillips 66 station on Providence where he told Mallory what he and Ryan did. (TT 561). This location was several blocks south of what he had originally told police. Erickson testified that when he and Ryan arrived back at Ryan's car on First Street Ryan opened the trunk and got out a plastic grocery

bag. (TT 564-66). Erickson could not remember what he did with his clothes or shoes. (TT 575). Erickson testified he and Ryan went back to the club, By George, where people were still drinking and dancing. (TT 567). Later, after the club closed, Ryan dropped Erickson off at home. (TT 574).

Erickson admitted that he told the nurse at the jail he was not really sure he had committed the crime, even after his arrest. (TT 768-69). His parents encouraged him to reach a plea agreement to testify against Ryan and that the more details he provided the better deal he could get. (TT 777-78).

Trump provided the only corroboration of Erickson's inconsistent, severely impeached trial testimony. Trump indicated he was in the penitentiary between December 2001 and December 2004 for felony endangering the welfare of a child. (TT 988-90, 1020). Trump testified that while he was incarcerated his wife, Barbara Trump, sent him a newspaper article about the Heitholt murder published after Ryan's and Erickson's arrests. (TT 1021). Trump testified that the article was folded in such a manner that he saw the photographs of Ryan and Erickson before he saw the rest of the article. (TT 1000). According to Trump he had seen those faces at the Tribune the night Heitholt was killed. (TT 1022). Trump identified Ryan as one of the two individuals he saw. (TT 1029). Because the defense was unable to show that any State action led to the identification, the trial court denied the defense's motion to exclude the identification. (TT 1017).

No physical evidence found at the crime scene was connected to Ryan or Erickson. (TT 1332-52, 1368-93). No items found in Ryan's car were connected to

Heitholt, and the tire tool taken from the car Ryan was driving that night was excluded as the murder weapon. (TT 538, 1217-22, 1228-32). Ryan and Erickson were both excluded as contributors of the hair found in the victim's hand, and the fingerprints and shoe prints found at the scene. (TT 663-666, 1360-64, 1603-06, 1686-88). The police never found Heitholt's watch, car keys, or the rest of his belt.

The murder took place between 2:12 and 2:20 a.m. on November 1, 2001. (TT 925-26, 1061). Erickson testified he and Ryan went back to the club where people were drinking and dancing after the attack on Heitholt. (TT 567). Contrary to Erickson's testimony, By George closed every night at 1:30 a.m. (TT 1730-32). The bartender testified he was probably gone by 2:00 a.m. that night, and two other customers confirmed the bar closed at 1:30 a.m. (TT 1733, 1714-15). Heitholt's wallet was found in his car. (TT 1176, 1225).

Ryan testified in his own defense. Ryan steadfastly maintained his innocence from the date of his arrest. (TT 1766-67). Ryan remembered going to By George on Halloween night, 2001. (TT 1778-81). Ryan paid for him and Erickson to get in then bought them each a drink. (TT 1782-83). Close to closing time all the lights came on, the music turned off and bar employees kicked everyone out. (TT 1785). Ryan and Erickson left around 1:20 or 1:30 a.m. (TT 1784-86). Ryan drove Erickson home. (TT 1786). Ryan then drove home. (TT 1788). After arriving home, Ryan made a final

phone call at 2:06 a.m. and spoke with Holly Admire. (TT 1790-92).[4] Ryan did not go to the Tribune parking lot that night. (TT 1802).

After deliberations, the jury convicted Ryan of second-degree murder and first-degree robbery and Ryan was sentenced to terms of thirty and ten years' imprisonment. (TT 2188-89, 2230).

2. Direct appeal and Rule 29.15 proceedings

Ryan appealed his conviction. This Court affirmed the conviction by per curiam opinion. *State v. Ferguson*, 229 S.W.3d 612 (Mo. App. W.D. 2007).

Ryan filed a timely post-conviction motion under Rule 29.15. The Rule 29.15 motion made claims based on the State's failure to disclose exculpatory evidence and ineffective assistance of counsel. The motion court denied relief. Ryan appealed the denial of his Rule 29.15 motion and, simultaneously, filed a Motion to Remand Based Upon Newly Discovered Evidence. The motion to remand was based upon Erickson's sworn statements that he alone perpetrated the robbery and murder. This Court affirmed the denial of the Rule 29.15 motion, and further denied the motion to remand. In doing so, however, this Court noted:

> That is not to say that the issues of this case do not give us pause. The sole evidence tying Ferguson to the crime was the testimony of Erickson and the identification from Trump. There is no physical evidence that ties Ferguson to this murder.

Ferguson, 325 S.W.3d at 419.

[4] The cell tower records - which would have provided a location from which the calls were made - were destroyed prior to Ryan's arrest.

3. Newly discovered evidence presented at habeas hearing on April 16-20, 2012

The newly discovered evidence obtained since trial and presented at the habeas hearing below establishes the following:

1. Trump committed perjury at Ryan's trial when he falsely identified Ryan as a person he saw by Heitholt's vehicle the night of the murder.

2. Erickson committed perjury at Ryan's trial when he falsely testified that he remembered that he and Ryan perpetrated the murder.

3. Prosecuting Attorney Kevin Crane ("Prosecutor Crane") knew and/or should have known, based on evidence in his possession that was not disclosed to the defense, that Trump committed perjury at Ryan's trial. Prosecutor Crane also knew and/or should have known that false information was provided to Erickson to convince him of his guilt, and to convince him that he should take a plea to testify against Ryan.

4. The State committed several *Brady* violations by failing to disclose exculpatory and impeachment evidence to Ryan's defense:

(a) The State failed to disclose that Barbara Trump, Jerry Trump's wife, was interviewed and that she had no memory of sending the article to Trump which served as the basis for his alleged identification of Ryan;

(b) The State failed to disclose that Kim Bennett ("Bennett") was interviewed and told police that she witnessed Ryan and Erickson leave the bar at approximately 1:30, get into Ryan's car, and drive off; and,

(c) The State failed to disclose that Michael Boyd ("Boyd"), the last person to see Heitholt alive, was interviewed and provided information to police that established the timeline proving that the two white individuals at the scene could not have committed the murder. Boyd placed himself at the murder scene at the time of Heitholt's murder, and this direct evidence connecting him to the crime would have allowed the defense to introduce evidence of Boyd as a suspect.

5. At the time Ryan's jury was selected Lincoln County employed an opt out procedure which allowed otherwise qualified jurors to pay a fee and perform community service in lieu of jury duty.

As a result of this newly discovered evidence, Ryan has established his actual innocence by clear and convincing evidence. Moreover, the prosecution's knowing use of perjured testimony subverts the truth-seeking process and entitles Ryan to relief. Likewise, the failure to disclose material exculpatory and impeachment evidence constitutes a due process violation. Finally, the jury selection procedures used by Lincoln County denied Ryan his fundamental right to have a jury selected in conformity with jury selection statutes and further warrants habeas relief.

REASONS FOR GRANTING THE WRIT

CLAIM ONE

THE RECANTATIONS OF JERRY TRUMP AND CHARLES ERICKSON CONSTITUTE NEWLY DISCOVERED EVIDENCE THAT ESTABLISH RYAN'S ACTUAL INNOCENCE. RYAN HAS THUS MADE A CLEAR AND CONVINCING SHOWING OF ACTUAL INNOCENCE THAT UNDERMINES CONFIDENCE IN THE CORRECTNESS OF THE JUDGMENT

In *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003), the Missouri Supreme Court held that a freestanding claim of actual innocence is cognizable in Missouri state habeas proceedings even absent any constitutional violation. In order to obtain relief based on such a claim, a petitioner must make a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment. *Id.* at 543. The "clear and convincing" burden is less than "beyond a reasonable doubt" but heavier than a "preponderance of the evidence." Evidence is clear and convincing when it "instantly tilts the scales in the affirmative when weighed against the evidence in opposition, and the fact finder's mind is left with an abiding conviction that the evidence is true." *Id.* at 547-48.

The Court applied these principles to the evidence presented by Joseph Amrine. In *Amrine* the Court held that although the evidence at trial was constitutionally sufficient to support the conviction, there was significant evidence indicating Amrine's innocence from the beginning, such as the lack of physical evidence linking Amrine to the murder. "Instead, Amrine was convicted solely on the testimony of three fellow inmates, each of

whom have now completely recanted their trial testimony." *Id.* at 548. The Court concluded, "This case thus presents the rare circumstance in which no credible evidence remains from the first trial to support the conviction. . . . As such, confidence in his conviction and sentence are so undermined that they cannot stand and must be set aside." *Id.* at 548-49.

As in *Amrine*, all of the evidence against Ryan has been legally and factually refuted by clear and convincing evidence. The prosecution's case against Ryan consisted entirely of Erickson's testimony and the Trump identification. Both Trump and Erickson have credibly recanted their trial testimony, and Ryan's conviction must be set aside.

A. JERRY TRUMP

Trump's identification of Ryan was crucial to the prosecution because it provided the only corroboration of Charles Erickson's impeached, inconsistent, and implausible trial testimony.[5] Trump testified at trial that he was able to identify Ryan after seeing a newspaper article he received in prison after Ryan's arrest. Trump recanted his trial testimony at the lower court habeas proceedings. Judge Green held that Trump had, in fact, committed perjury at Ryan's trial where he identified Ryan as one of the two individuals he saw standing by the victim's car on the night of the murder. (Pet. Exh. 116, p. 17).

[5] One juror, interviewed after Ryan's trial, stated about Trump, "He'd seen him and pointed him out. That was pretty much all you needed right there." (Pet. Exh. 122).

1. Trump has admitted that his trial testimony identifying Ryan as a person near Heitholt's car on the night of the murder was false

Trump testified at trial that he was employed as a janitor and was cleaning the Tribune building in the early morning hours of November 1, 2001. (TT 968-69). Ornt went outside at 2:20 a.m. and saw somebody behind Heitholt's car. (Pet. Exh. 105) (H.Dep. Baxley Grp. Exh. A). She re-entered the building and informed Trump about what she saw. (TT 969). Trump went out onto the loading dock and looked towards the vehicle. (TT 972). Two individuals raised up from behind the car and one of them said, "Someone's hurt out here, man." (TT 973). This was the best view Trump ever had of the individuals. (TT 982). Shortly after this sighting, Trump saw the two men, from behind, as they were walking east in the alley towards Fourth Street. (TT 978).

Outside the presence and hearing of the jury, Trump testified that from December of 2001 until December of 2004 he was incarcerated. (TT 999). Trump testified he was contacted by Prosecutor Crane's investigator, William Haws, after he was released. (TT 999). Trump later met with Prosecutor Crane and Haws at Crane's office. (TT 1000). During that meeting, Trump allegedly told Prosecutor Crane that while he was incarcerated "it was printed in the paper that somebody had confessed to the murder and named another individual." (TT 1000). Trump testified his wife sent him the actual Columbia Tribune article. (TT 1000). Trump also testified that when he opened the envelope the first thing he observed was the photographs of Ryan and Erickson on the front page of the Columbia Tribune dated March 11, 2004. (TT 1000).

According to Trump, he did not see the headlines describing the arrest before he recognized the photos. (TT 1000). The prosecution published trial exhibit 30 to the jury, which was the enlarged front page of the Columbia Tribune article from March 11, 2004. (Pet. Exh. 6).

Trump testified that when he saw the photographs he "remembered them as the ones that I had seen behind Kent's car." (TT 1001). Trump identified trial exhibit 30 as the article he received in prison. (TT 1003-06). Outside the presence of the jury, Trump identified Ryan as one of the individuals he saw in the early morning hours of November 1, 2001. (TT 1006). Then, in the presence of the jury, Trump identified the actual article from a full sized copy of the newspaper. (TT 1024). Trump identified Ryan, in open court, as one of the two individuals he saw by Heitholt's vehicle after the murder. (TT 1029).

Trump fully recanted his trial testimony at the proceedings below. Trump testified that he lied when he identified Ryan at trial as one of the individuals he saw by Heitholt's car in the early morning of November 1, 2001. (HH Trump 262-63).

2. Trump's recantation is fully corroborated by all the available evidence

The truth is that from where Trump stood on the loading dock he could not identify anyone standing as far away as Heitholt's car, particularly at night. At the habeas hearing Trump identified Petitioner's Exhibit 75, a photograph taken from the loading dock looking north from the back of the Tribune building. (Pet. Exh. 75). Trump was on the western-most edge of the dock, which obscured his view of the front of Heitholt's car where one of the two individuals stood. Trump testified that Exhibit 75

accurately reflects the distance he was standing from Heitholt's car. (HH Trump 211). Trump estimated this distance to be about 75 or 80 feet. (HH Trump 211). Trump testified that he yelled and saw two people raise up from behind Heitholt's car. (HH Trump 212). Trump observed one individual for approximately 10 seconds. (HH Trump 212). Asked if he was able to recognize either individual, Trump testified, "No. I tried to make, you know, recognition out of it, but I wasn't able to." (HH Trump 215).

Trump testified that when he saw the individuals on the night of November 1, he was unable to make out their individual features such as ears or noses. (HH Trump 223). Undoubtedly this is the reason Trump could not assist authorities in making the composite sketch of the individuals. (HH Trump 223).

Following the murder, Trump's probation was revoked and he was sent back to prison for three years. (HH Trump 224). At the habeas hearing Trump testified that his first contact with Prosecutor Crane and his Investigator William Haws ("Haws") was actually before, not after, his release from prison as he had testified to at Ryan's trial. Approximately a week prior to his release on December 13, 2004, Trump was placed in a private room and received a call from Haws and Prosecutor Crane. (HH Trump 226). During that conversation Trump was told they had arrested the right guys and they needed him to identify them at trial. (HH Trump 227). Prosecutor Crane told Trump not to write anything down and they would leave a business card with his wife, which they did. (HH Trump 227). Trump testified that he followed up on the request and met with Prosecutor Crane and Haws because he had been in trouble enough, and he did not want

further trouble. (HH Trump 228). Judge Roper, the trial judge, was never informed by Prosecutor Crane of the prison phone call to Trump prior to his release. (TT 999-1013).

At the time of trial Trump had several motives to testify falsely. On the night of the Heitholt homicide, Trump was on parole for a conviction of endangering the welfare of a child. Shortly after the murder, Trump's probation was revoked and he was sent to prison. Specifically, Trump failed a polygraph and his therapist removed him from the mandated sex therapy group. (Pet. Exh. 1, 1a) (H.Dep. Trump 38-39). Trump testified in his habeas deposition that he felt his probation was wrongly revoked. (Pet. Exh. 1, 1a) (H.Dep. Trump 28). At the time of the scheduled meeting with Prosecutor Crane and Haws on December 21, 2004, which was shortly after his release, Trump was "scared out of [his] mind that something else would go wrong." (Pet. Exh. 1, 1a) (H.Dep. Trump 28).

Trump's testimony about his fear and concern was corroborated by Prosecutor Crane, who testified that when he met with Trump, Trump "lament[ed]" his situation, and mentioned he had problems with his probation officer. (HH Crane 613). Trump testified that at that time he did not want to be in any more trouble and he was "apprehensive" about meeting with the prosecutor. (Pet. Exh. 1, 1a) (H.Dep. Trump 20, 29, 63). Trump also wanted to be as helpful to the prosecution as possible so they might return the favor. (Pet. Exh. 1, 1a) (H.Dep. Trump 92). Notably, since Trump's release from prison in 2004 his probation has not been revoked, and he has not faced any additional charges.

Trump had a motive to testify falsely when he identified Ryan as being present at the murder scene. Trump's probation was revoked shortly after the murder for what he deemed to be invalid reasons. As a result he spent three additional years in the

penitentiary. Trump met with Prosecutor Crane and Haws shortly after he was released from prison. Trump admits his motivation for meeting with them was to avoid any more legal trouble. (Pet. Exh. 1, 1a) (H.Dep. Trump 29). Trump testified that he was still on probation at the time of Ryan's trial, and that affected his trial testimony. (HH Trump 249).

Conversely, it is undisputed that Trump had no motive to falsely recant his trial testimony at the habeas hearing. On the contrary, Trump had every incentive to maintain that his trial identification of Ryan was truthful. Under the circumstances of this case, a charge of perjury against Trump would be a Class A felony:

> §575.040(7)(1), RSMo. 2000. Perjury committed in any proceeding involving a felony charge is a class C felony unless [i]t is committed during a criminal trial for the purpose of securing the conviction of an accused for murder, in which case it is a class A felony[.]

The possible range of punishment for a Class A felony is not less than ten years and not to exceed thirty years, or life imprisonment. §558.011(1), RSMo. 2000.

As a result of admitting he lied when he identified Ryan, Trump faces the very real possibility of perjury charges. Because perjury committed in a proceeding for the purpose of securing the conviction of an accused for murder is a Class A felony, Trump faces a sentence of not less than ten years and not to exceed thirty years, or life imprisonment. §575.040(7)(1), RMSo. 2000; §558.011(1), RMSo. 2000. Trump did not receive any immunity for his testimony in the habeas proceedings and has acknowledged that he knows he may be charged with perjury. (HH Trump 234). Perhaps in light of this

fact, the Attorney General admitted at the habeas hearing that there is no discernible motive for Trump to falsely recant his identification. (HH Bruce 742).

The falsity of Trump's trial identification is further corroborated by the evidence that he could not have received the newspaper article while in prison as he testified at trial. Prosecutor Crane testified at the habeas hearing that he believed Trump received the actual Columbia Tribune newspaper and not an 8 ½ by 11 xerox copy. (HH Crane 602). But that could not have happened, because it would have been impossible for Trump to have received the actual newspaper while incarcerated in the Missouri Department of Corrections. It is undisputed the size of the Columbia Tribune newspaper of March 11, 2004, was 22 inches by 12 inches. (Trial Exh. 30). Respondent's exhibit T4, introduced at trial and at the habeas hearing, was the actual Columbia Tribune newspaper with pictures of Erickson and Ryan.

It was impossible for Trump to have received the actual newspaper in prison because the governing rules in effect for the Missouri Department of Corrections in 2004 prohibited the receipt of clippings/enclosures the size of the Columbia Tribune article identified by Trump at trial. The rule which addressed the requirements for incoming mail dictated that:

> Clippings/enclosures - 5 pieces of paper (up to 8-1/2 x 11) will be permitted in addition to the letter. (Missouri Department of Corrections Policy and Procedure Manual, effective date May 11, 2003, Part III(F)(1)(f) (Pet. Exh. 111)).

The rules also provided that photographs or pictures of an offender will not be permitted. (Pet. Exh. 111).

Thus, there are three reasons Trump could not have received the newspaper as he testified to at trial. First, the newspaper was too large. Second, the newspaper contained photographs of offenders. Third, Trump's wife, who Trump testified sent him the article, told Haws that she had no recollection of ever sending him the article. (HH Haws 667-68).

Trump's recantation is further corroborated by the fact that immediately after the murder he was unable to give a detailed description of the two individuals he saw by Heitholt's car. In his first interview, Trump told Officer Baxley ("Baxley") that "the individual who was behind the rear driver's side of the vehicle was a white male, stocky build, possibly dark hair with a ball cap resting on top of his head and appeared to be approximately six feet tall."[6] (Pet. Exh. 105) (H.Dep. Baxley 13). Trump identified the second individual as being located at the front driver's door and being "a white male, blond hair which was short, approximately six feet tall, thin build, 19 to 20 years of age." (Pet. Exh. 105) (H.Dep. Baxley 15). Trump failed to provide any details at all about the facial features of the two individuals.[7]

It is noteworthy that Prosecutor Crane did nothing to corroborate the plausibility of Trump's putative trial identification. Trump estimated the distance from where he was standing on the dock behind the Tribune building to Heitholt's car to be about 75 or 80 feet. (HH Trump 211). This corresponds with measurements taken by Investigator Steve Kirby ("Kirby"). (HH Kirby 30). Petitioner's Exhibit 75 is a photograph taken from

[6] Erickson, who had dark hair, denied wearing a cap on the night of the murder. (PT Dep. Erickson 229).

[7] Trump's initial descriptions do not match Ryan and Erickson. At the time both boys, who were juniors in high school, stood approximately 5 feet 6 inches to 5 feet 7 inches tall and weighed 140-150 pounds.

Trump's location on the loading dock the night of the murder. Trump testified that Exhibit 75 accurately represents his view from the dock to the location of Heitholt's car on November 1, 2001. (HH Trump 211). Kirby also testified that Exhibit 75 accurately represents the lighting, clarity and visibility of people and objects observed from the loading dock where the photograph was taken. (HH Kirby 29).

It is clear from viewing Petitioner's Exhibit 75 that Trump would not have been able to recognize the individuals standing by Heitholt's car. The distance in combination with the lighting makes it highly improbable that any person in Trump's location would have been able to identify an individual standing by Heitholt's car. This accounts for Trump's inability to provide a detailed description to police immediately after the murder, as well as his statements to others that he could not make an identification.

Trump's recantation testimony is credible and corroborated by all of the available evidence. Trump's admission of perjury, on the witness stand at the habeas hearing, is inherently reliable. Trump's recantation is supported by his pretrial statements to police and the circumstances under which he viewed the individuals by the victim's vehicle. No undue influence was exercised to get Trump to recant, and the threat of a perjury charge outweighs any speculative motive as to why he would falsely recant. Consistent with Judge Green's ruling, Trump's trial testimony that he was able to identify Ryan based upon seeing a newspaper article he received in prison is "too fantastic to be believed." (Pet. Exh. 116, p. 17).

B. CHARLES ERICKSON

Clearly, Erickson's trial testimony was fabricated from police reports. Erickson relied on the police reports to create the story. However, because the police reports contained numerous mistakes ranging from the motive to the murder weapon, Erickson's trial testimony was fraught with errors, implausibilities and inconsistencies. Just a few of those inconsistencies are summarized as follows:

- On the day of his arrest Erickson told Detective Short that a shirt or a bungee cord was used to strangle Heitholt, then admitted he was "just guessing." (TT 668). Erickson never thought it was a belt and when Short told him it was a belt, Erickson was incredulous. (TT 669). Erickson stated, "Oh really? A belt?" After Short told him it was a belt, Short asked Erickson, "Does that ring a bell?" to which Erickson responded, "Not at all." (TT 669).

- Erickson admitted that he told police in his first interview that Heitholt kicked him in the testicles, but at trial he testified Heitholt had not kicked him in the testicles. (TT 644). Erickson told police he thought he vomited at the scene. (TT 642). This contradicts the undisputed fact that there was no vomit found at the scene.

- Erickson admitted that he had first told the police that Heitholt was lying face up when Ryan strangled him, but the undisputed testimony is that Heitholt was face down when his body was discovered. (TT 672). Forensic pathologist Larry Blum, M.D. ("Dr. Blum"), who testified at the habeas hearing, described the position of the body as face down when the strangling occurred. See *infra*.

- Erickson testified that Ryan entered and searched Heitholt's car. (TT 551). This contradicts the undisputed fact that none of Ryan's fingerprints were found in the car and Erickson did not testify that they were wearing gloves. (TT 1360).

- Erickson testified he yelled at Ornt, "This man's hurt. Go get help" and "Go get help. This man needs help." (TT 553-54). This contradicts

Erickson's testimony during cross-examination, wherein Erickson admitted that he told police his information about what the cleaning lady heard came from the newspaper. Specifically, Erickson told Detective Nichols, "Look I'm just here trying to come up with something that I can - think I remember based on what I read." (TT 714). Erickson also testified that when Detective Short asked him if he said anything to Ornt, Erickson said he was not sure. (TT 813-14). Short then told Erickson that Ornt told the police that someone asked for help and then Erickson said that was him. (TT 815).

- Erickson testified that he did not take the tire tool from the scene and that he did not observe Ryan with it. (TT 558). A tire tool was not found at the scene. The tire tool in Ryan's car was never linked to the crime. At the habeas hearing Dr. Blum ruled out the tire tool as the murder weapon. (HH Blum 144-45).

- Erickson testified that he only took the broken belt from the scene. He did not testify that he or Ryan took Heitholt's keys or watch, nor could he explain what happened to these items. (TT 573). This contradicts the undisputed fact that Heitholt's keys and watch were taken from the scene and have never been found. (TT 419-20).

- In one of Erickson's initial police interviews, he claimed that after the murder he and Ryan headed west to the northeast corner of Providence and Ash where they saw Mallory at a stoplight next to the Break Time, which is located on the northeast corner of Providence and Ash. (TT 648, 674).[8] In his videotaped interview with Nichols driving him on the different route the tracking dog took from the crime scene, Erickson advised the route did not look familiar. (TT 685-86). Erickson then changed his testimony at trial so it would match the route taken by the tracking dog from the murder scene. (TT 558-60).

- During Erickson's demonstration at trial with Prosecutor Crane, he never demonstrated Heitholt "being thrown to the ground" during the attack. (TT

[8] At the 29.15 hearing Mallory denied being at Providence and Locust on November 1, 2001 and having a conversation with Ryan and Erickson. (PCTr. 267-68).

670). Erickson admitted that in his first interview with police he stated either he or Ryan threw Heitholt to the ground. (TT 671).

- Erickson testified at trial that Ryan called Erickson after the murder and told him that Ryan's dad had discovered the victim's wallet. (TT 588-89). This is a verifiably false fact. The victim's wallet was not taken; it was discovered by police in the victim's car. (TT 1176)

- Erickson admitted at trial he had told others he did not know whether the impressions he was having concerning the death of Heitholt were memories or dreams. (TT 627-28). He told his friends, Figueroa and Gilpin, of his confusion. (TT 627-28). Neither Figueroa or Gilpin were called to testify at trial, nor was Mallory. Supposedly all three of them had incriminating evidence against Erickson but were not reliable enough in the prosecution's estimation to call at trial.[9]

Even the Attorney General has admitted the deficiencies in Erickson's trial testimony. In its brief on appeal of the denial of Ryan's 29.15 motion, the Attorney General admitted that at trial Ryan's defense "presented a substantial quantum of impeachment evidence" with regard to Erickson's trial testimony. (Pet. Exh. 119, p. 52). The Attorney General pointed out that defense counsel elicited seventeen statements that undermined Erickson's credibility, including that Erickson made inconsistent and incorrect statements to police; that he stated he might be confusing memories with dreams; that he could not recall certain facts, and that he simply "presumed" or tried to guess some of the facts; that he asked for facts and details from the police, which they provided to him; that he told police he was unsure about whether he was involved in the murder, and that he might not know what he was talking about; that he told police his

[9] The failure of the prosecution to put on such key witnesses raises an inference that the witness' testimony would not have been favorable to the prosecution. See *Robnett v. St. Louis University Hospital*, 777 S.W.2d 953, 956 (Mo. App. E.D. 1989); *Bauer v. Bauer*, 38 S.W.3d 449, 459-60 (Mo. App. W.D. 2001).

memory was "so foggy" and that he could be "fabricating" his involvement; that he told a jail nurse he was unsure of his involvement; that his parents persuaded him to take a plea and testify against Ryan, and that his father told him if he did not cooperate he would "be looking at a substantially greater period of time to serve"; that he was expecting 15 year sentences and hoping to serve less than that under the terms of his agreement; and that after the murder he had no conscious belief that he was involved in the death of the victim. (Pet. Exh. 119, pp. 53-55).

The Attorney General also admitted that defense counsel presented the testimony of three witnesses that directly contradicted Erickson's account of the bar remaining open past 1:30 a.m., as well as an expert on memory who disputed the notion of a repressed memory as described by Erickson at trial. (Pet. Exh. 119, p. 55). The Attorney General concluded that trial counsel had "exhaustively impeached" Erickson. (Pet. Exh. 119, p. 56).

This Court, too, has noted the problems with Erickson's version of events at trial, many of which are summarized above. This Court concluded:

> On cross-examination, Erickson was subjected to a lengthy and extensive cross-examination, wherein Ferguson's trial counsel was successful in illustrating that Erickson had made various prior statements that seriously undermined Erickson's credibility.

Ferguson, 325 S.W.3d at 417 (emphasis added).

1. Erickson has admitted that his trial testimony stating he remembered perpetrating the murder with Ryan was false

At the habeas hearing Erickson testified that as of October 30 or October 31, 2001, he had just completed probation for a marijuana possession charge. (HH Erickson 270-

71). At that time he was using a "good amount" of Adderal, cocaine and had been drinking. (HH Erickson 270-71). In 2001, Erickson used marijuana three or four times a day. (HH Erickson 271). He drank almost every Friday and Saturday. Occasionally he used LSD or mushrooms. (HH Erickson 271). Erickson testified that when he drank he would drink to the point of blacking out. (HH Erickson 271).

On the evening of October 31, 2001, Erickson was at John Cole's house with a few other guys. (HH Erickson 272). He might have taken Adderall and drank alcohol while he was at Cole's residence. (HH Erickson 272). Erickson and his friends then went to a Halloween party at Ryan Swilling's house. (HH Erickson 272). Erickson took Adderall orally, snorted Adderall, snorted cocaine and drank from a keg at the party. (HH Erickson 272). Erickson also played drinking games. (HH Erickson 274) The police showed up and broke up the party, and Erickson left. (HH Erickson 273). He was intoxicated by the time he left the Swilling residence. (HH Erickson 274).

Erickson testified that his ride left him at the party. (HH Erickson 273). Erickson could not remember how or when, but he recalled ending up in Ryan's car. They decided they were going to go to a club called By George. (HH Erickson 274-75). Erickson remembered drinking green drinks at the club and being "pretty intoxicated." (HH Erickson 276). Erickson had no memory of leaving the bar or going home that night. (HH Erickson 276).

Erickson remembered nothing from the rest of the night until he woke up the next morning at home. (HH Erickson 277). He did not have blood on his clothes; he did not

wake up thinking he had killed someone; he did not see any marks or injuries to his body; and there was nothing out of the norm. (HH Erickson 278).

Erickson testified his next contact with Ryan was maybe a few days later. (HH Erickson 281). He mentioned to Ryan that it was crazy that somebody had been killed a couple of blocks from where they were partying. (HH Erickson 281). Erickson could not recall Ryan's response. (HH Erickson 282). Erickson did not think at that time that he or Ryan had committed the murder. (HH Erickson 282).

Erickson's drug and alcohol use continued and increased "a lot" in 2001 through 2003. (HH Erickson 282). Due to having his own vehicle, Erickson had more independence which facilitated his substance abuse. (HH Erickson 282). Erickson testified he used more and different drugs. (HH Erickson 272).

In November of 2003, Erickson read an article about the murder in the newspaper. The article contained a composite sketch of the suspect. (HH Erickson 283). At the time Erickson thought the composite looked a lot like him. (HH Erickson 283). However, he did not remember committing the murder. (HH Erickson 283). Erickson continued to read about the case on the internet by searching the archives of the Columbia Tribune. (HH Erickson 283-84). Asked why he was so interested in reading about the murder, Erickson testified after seeing the sketch he realized he couldn't remember going home from By George. (HH Erickson 284).

Erickson testified that from the newspapers he learned that the victim had been beaten with a blunt object and strangled. (HH Erickson 284). The papers reported that two young white males at the scene were considered suspects, and DNA had been

recovered. (HH Erickson 284). Erickson also learned that somebody said something to a cleaning lady and she went to get help. (HH Erickson 284).

As he read the articles Erickson started to question whether he had done the murder. (HH Erickson 285). Erickson first had a conversation with Ryan about the murder on New Year's Eve 2003-2004. (HH Erickson 285). Erickson testified he "wanted to make sure [he] hadn't been involved because [he] couldn't remember." (HH Erickson 286). Erickson was intoxicated and had consumed cocaine prior to the conversation with Ryan. (HH Erickson 286). Ryan thought Erickson was joking. (HH Erickson 287). Erickson later at the same party asked Ryan again about the murder, and Ryan told him, "We didn't do that." (HH Erickson 289). Erickson grew paranoid during this period of time. Erickson imagined people were talking about him at school. (HH Erickson 288-90). Erickson started to think maybe he was involved in the murder due to what he believed other people were saying. (HH Erickson 291).

In late February or early March of 2004, Erickson had a conversation with Gilpin, a person who Erickson "drank and got high with." (HH Erickson 292). Erickson testified that he told Gilpin that he and Ryan "might have been involved" in the murder and if they were involved, Erickson wasn't the one who killed the victim. (HH Erickson 293). Erickson told Gilpin that Ryan strangled the victim while he took the lesser role. (HH Erickson 293).

Erickson testified that when he told Gilpin that Ryan strangled the victim, that was not a true statement. (HH Erickson 293). He also testified that it was untrue that he told the cleaning lady to go get help. (HH Erickson 294). Nothing he told Gilpin was true.

(HH Erickson 294). Erickson testified he made assumptions based on what he read about how it must have happened. (HH Erickson 295). A few days later Erickson had basically the same conversation with Figueroa. (HH Erickson 296). Erickson mentioned to him that he wanted to have his DNA tested, knowing from the newspaper that there was DNA collected at the scene. (HH Erickson 297).

Erickson's drug and alcohol use affected his thinking. (HH Erickson 295). Erickson used cocaine when he drank. (HH Erickson 296). The only time he ever talked about the murder was when he was high on cocaine and drunk. (HH Erickson 296).

Erickson testified after his arrest he gave false statements to police about being involved in the murder. (HH Erickson 298). Erickson gave false statements because he did not want to be the most responsible for the murder. (HH Erickson 299). Erickson said the police "got me to say what they wanted to hear" and he was a "mess." (HH Erickson 300). Erickson testified the night before his police interviews he was out drinking and using cocaine. (HH Erickson 300-01). He also smoked marijuana that morning on the way to school prior to his arrest. (HH Erickson 301).

Erickson testified that after his arrest, he was provided with copies of the police reports and discovery in his case. (HH Erickson 302). One of the reports turned over was of an interview with Richard Walker ("Walker"), an inmate at the Boone County Jail. (HH Erickson 302-03). Erickson read in the report that Walker told investigators Ryan had said incriminating things to him about the murder. (HH Erickson 303). Walker also told Erickson at the jail that Ryan was going to try to do whatever he could to put the crime on Erickson. (HH Erickson 303-04). Another report stated that Dallas

Mallory told police that he saw Erickson leaving the scene with something in his hand and that Erickson said they had killed someone. (HH Erickson 304). Yet another report indicated that Ryan had provided incriminating information to Meghan Arthur ("Arthur"), which was also false. (HH Erickson 344-45).[10] Erickson became convinced he was guilty after speaking with Walker and reading these false police reports. (HH Erickson 302).

After reviewing the discovery Erickson decided to plead guilty. Erickson testified that from the beginning he had people talk to him about keeping him from getting charged with first-degree murder. (HH Erickson 305). To Erickson, a first-degree murder charge meant spending the rest of your life in prison and possibly getting executed. (HH Erickson 307). During the subsequent proffer Erickson told law enforcement "what they wanted to hear." (HH Erickson 306). Erickson made things up, which "was easy because they couldn't prove anything." (HH Erickson 307).

Erickson testified at trial that he robbed and beat Heitholt with a tire tool. (TT 474). Asked if that testimony was false, Erickson testified, "Saying that I remembered was false." (HH Erickson 309). Erickson testified that he does not think that he robbed and beat the victim. (HH Erickson 309). Erickson further testified that his trial testimony that he remembered Ryan robbing and strangling the victim was false. (HH Erickson 309). Erickson lied when he testified he remembered hitting the victim a

[10] Mallory and Arthur have both come forward and testified that the information contained in the reports is false. Mallory did not encounter Erickson and Ryan in downtown Columbia the night of the murder. (PCTr. 267-68). Likewise, Arthur, who was not called to testify at trial, told defense investigator Jim Miller that the report stating that Ryan admitted to "doing something stupid" was fabricated. (H.Dep. Miller 15-30) (Pet. Exh. 100, 100a). Walker, who also was not called to testify at trial, admitted to Miller that he provided false information to Erickson about Ryan. (H.Dep. Miller 33-35) (Pet. Exh. 100, 100a).

number of times, seeing Ryan strangle the victim with the belt, and taking the victim's watch, belt and car keys. (HH Erickson 310). Erickson lied when he described going back to By George after the murder, and calling out to the cleaning lady to go get help. (HH Erickson 310).

2. Erickson's recantation is fully corroborated by all the available evidence

Erickson testified at the habeas hearing that he never has had any memory of leaving the By George bar on November 1, 2001, and he attributes his lack of memory to his heavy alcohol and drug use that evening. Erickson testified that his trial testimony about the beating and murder of Heitholt was false. He further testified that his trial testimony that he remembered Ryan robbing and strangling the victim was false.

i. Erickson's habeas testimony about his memory loss is corroborated by his pre-trial and custodial statements

Erickson's habeas testimony as to his memory loss is corroborated by and consistent with the numerous statements he made prior to his arrest and while being interrogated by Short and Nichols on March 10, 2004. As detailed, *supra*, Erickson admitted at trial that until 2003 he did not have any conscious memory that he was involved in the death of Heitholt. For a period of many months after he was first investigated by police Erickson stated to friends, the police, his parents, and even a jail nurse that he was uncertain whether he and Ryan had murdered the victim. Erickson told police that he didn't remember the murder and he might be confusing memories with dreams, and that he could be fabricating his and Ryan's involvement. *Ferguson*, 325 S.W.3d at 418.

Likewise, Prosecutor Crane has always admitted that Erickson had gaps in his memory about the events of November 1, 2001. Prosecutor Crane told the jury at Ryan's trial, "And no, he couldn't remember every detail. And yes, some things came back to him. Some things didn't." (TT 2120) (HH Crane 595).

Erickson's initial statements at the time of his arrest that his memory was "so foggy," that he could be confusing memories with dreams, that he made "presumptions" based on what he read in the paper, and that he could be fabricating memories all corroborate his habeas testimony that he never had any memory of being involved in the murder.

ii. Erickson's recantation is corroborated by the testimony of Dr. Blum, a forensic pathologist

Dr. Blum, a forensic pathologist, testified on Ryan's behalf at the habeas hearing. Dr. Blum has performed 10,000 autopsies in his career. Of those, 1,000 have been homicides. Dr. Blum has testified over 500 times as an expert in forensic pathology. Of those times, 95 to 98 percent of the time he has testified on behalf of the prosecution. (HH Blum 122). Dr. Blum offered testimony that casts further doubt upon Erickson's trial testimony, and corroborates Erickson's recantation.

Erickson testified at trial that the motive for the attack on Heitholt was robbery. (TT 516-17). Erickson's testimony regarding motive has always been suspicious, because Erickson initially told police he thought he and Ryan had taken the victim's wallet when in fact the wallet had been found in the victim's car. (TT 646, 1178).

Dr. Blum opined that the forensic evidence does not support the robbery motive that was presented at Ryan's trial. Dr. Blum testified that the nature of the attack was indicative of deep animosity on the part of the perpetrator towards the victim, stemming from a personal relationship. (HH Blum 189-90). Dr. Blum's testimony is consistent with the nature of the attack and the fact that nothing of any real value was taken from the scene.

Dr. Blum re-examined the autopsy photos and offered the opinion that Erickson's testimony regarding the weapon used to strike Heitholt was also inaccurate. Dr. Blum was able to rule out a tire tool as being the instrument used to strike Heitholt because of its weight and shape. (HH Blum 144). Heitholt sustained no skull fractures, which Dr. Blum opined would have occurred with repeated blows with a tire tool. (HH Blum 149). Dr. Blum testified to a reasonable degree of medical certainty that based on the injury pattern and other factors, the instrument used to inflict the blunt force trauma on the victim was a nail puller. (HH Blum 148). This testimony supports Erickson's recantation that his trial testimony was false when he testified he used a tire tool from Ryan's trunk to strike the victim on the head. (TT 519, 525).

Dr. Blum further testified that Erickson's trial testimony about the beating and murder is totally inconsistent with the forensic evidence. At trial, Erickson and Prosecutor Crane reenacted Erickson's attack on Heitholt for the jury. Both men were approximately the same height at 5 foot 7 or 8 inches, while Heitholt was 6 foot 4 inches tall. Erickson stood directly behind Crane and simulated striking the prosecutor on the back of the head as the victim stood upright. (TT 538-41). Dr. Blum opined that there

were no blows on the back of the victim's head consistent with someone striking the victim from behind while he stood upright. (HH Blum 151-52). Likewise, Erickson never mentioned hitting Heitholt's hands or arms. This contradicts the undisputed fact that Heitholt had multiple defensive wounds on his hands according to Dr. Blum. (HH Blum 132).

Dr. Blum also refuted Erickson's testimony regarding the location of the attack. Erickson testified at trial most of the attack occurred by the driver's door. (TT 526). However, most of the attack occurred by the driver's side rear wheel according to Dr. Blum. (HH Blum 156). Blum also testified that the entire attack took 6 to 8 minutes. (HH Blum 194). This is within the 10 minute time-frame for the crime testified to by Dr. Adelstein at Ryan's trial. (TT 1428).

iii. Erickson's recantation is corroborated by the testimony of Joseph Buckley, an expert in interrogation techniques

Joseph Buckley ("Buckley") testified at the habeas hearing as an expert in interrogation procedures. Buckley is President of John Reid and Associates. (HH Buckley 60). Reid and Associates conducts anywhere from 300 to 400 training programs every year on proper interrogation and interviewing techniques. (HH Buckley 60-61). The Reid method is the foremost authority on interrogation techniques. (HH Buckley 61). Short and Nichols both testified at their depositions that they had been trained in the Reid method. (Pet. Exh. 107) (H.Dep. Short 6); (Pet. Exh. 106a) (H.Dep. Nichols 11).

Over the course of Buckley's career he has conducted over 12,000 interrogations, interviews and examinations. (Pet. Exh. 17). Buckley has personally conducted over 1,000 training programs on how to conduct proper interrogations. (HH Buckley 62).

Buckley's testimony is proper, because it is new in light of Erickson's recantation. Buckley's opinions are based in part on Erickson's recantation affidavits, wherein Erickson stated he felt pressured by the police to give inculpatory statements and that the information he provided to them was gathered from newspapers. Erickson's recantation would cause a jury to view Buckley's testimony in a completely different light. Thus, Buckley's opinions are new evidence corroborating the recantation.

Buckley testified that one of the most important goals in an interrogation is to get corroborating detail as to what the person did or how they did it. (HH Buckley 70). Thus, one of the primary principles in any interrogation is to withhold some of the details about the commission of the crime to test the authenticity of a person's admissions or confession. (HH Buckley 70-71). Any interrogator should therefore ask open-ended questions as opposed to leading questions that disclose crucial information. (HH Buckley 77).

Here, Detectives Short and Nichols violated this principle in several respects. In Short's initial, unrecorded interview with Erickson, Short told Erickson that "the cleaning lady told the police that someone asked for help." (HH Buckley 85-87). Short also told Erickson that the victim had been struck more than once. (HH Buckley 79). During subsequent interviews, the detectives disclosed the only other pieces of information not contained in media accounts that only the perpetrator would know - that the victim was

strangled with his own belt and his keys and watch were stolen. (HH Buckley 81). Due to their improper interview techniques, the detectives were unable to corroborate Erickson's presence at the scene. (HH Buckley 85).

Buckley testified that there were other aspects of Erickson's interrogation that were improper or unusual. Buckley testified that it is highly unusual for a murderer to walk in and voluntarily confess. (HH Buckley 82). In such a situation it would be imperative to have the person give details known only to the perpetrator in order to test the reliability of the admission. (HH Buckley 82-83). Furthermore, unlike Erickson, once a person confesses they do not withhold details and are fairly descriptive of what they did and how they did it. (HH Buckley 83). Buckley opined that Erickson's admission that he had been drinking that night should have caused the detectives to explore his use of alcohol and drugs to determine if his memory was affected by such use. The detectives never made such an evaluation. (HH Buckley 83-84). Buckley testified that Erickson's putative statement that he told the cleaning lady to get help does not make any sense because a murderer, who has just killed somebody, does not call out for help so that the authorities get to the scene faster. (HH Buckley 85).

Buckley testified that he is not aware of any details that Erickson provided to police that were not known to police prior to their first interviews with Erickson. (HH Buckley 85). The detectives provided Erickson with the details of the murder that were not revealed by the media. (HH Buckley 85). This prevented police from corroborating Erickson's statement and confirming the authenticity of that admission. (HH Buckley 85, 90).

Finally, Buckley testified that Erickson provided false facts to police during his confession. For example, Erickson told detectives he and Ryan had stolen the victim's wallet when, in fact, it was found at the scene. (HH Buckley 94). Erickson told detectives he and Ryan went back to the By George well after 2:20 a.m., when it is undisputed that the bar had to close by law by 1:30 a.m. (HH Buckley 94). Erickson stated that Ryan entered the victim's car to steal something, yet Ryan's fingerprints were not found in the vehicle. (HH Buckley 94). Erickson also stated he vomited at the scene but there was no vomit discovered in the Tribune parking lot. (HH Buckley at 94-95).

Buckley's testimony supports Erickson's recantation. Erickson did not provide any details to the detectives such that they could corroborate the substance of his statements. Moreover, the few details only the perpetrator would know were provided by the detectives to Erickson in his interrogation. Erickson's confession was therefore never corroborated. Erickson also gave statements that were implausible and inconsistent with the evidence at the scene.

iv. Erickson's recantation is corroborated by a mental assessment report created by Greg Holliday, Ph. D., and Matt Stoel, M.A., of the University of Missouri-Columbia

On November 23 and 24, 2001, just weeks after Heitholt's murder, Erickson underwent an assessment of possible attention difficulties at the University of Columbia-Missouri. (Pet. Exh. 137). Dr. Greg Holliday and Mr. Matt Stoel of the University's Department of Educational and Counseling Psychology Assessment and Consultation Clinic subjected Erickson to a battery of tests, and submitted a report on November 26, 2011. (Pet. Exh. 137, pp. 4-10). The report indicates that Erickson suffered memory

"impairments," that "may significantly impair his ability to recall and recognize information he has been exposed to." (Pet. Exh. 137, p. 12). Dr. Holliday and Mr. Stoel indicated that it is possible that Erickson has experienced a minor brain insult or organic abnormality that has gradually compromised his memory, and also that Erickson's memory problems may be the result of substance abuse. (Pet. Exh. 137, p. 14). The evaluators recommended a "comprehensive neurological evaluation," which was never done. (Pet. Exh. 137, p. 16).

This mental assessment report demonstrates that Erickson has diagnosed memory problems, which likely arise from substance abuse. This corroborates his testimony that he simply does not remember the night of Heitholt's murder, a night in which he consumed significant amounts of drugs and alcohol.

v. Erickson's recantation is corroborated by his motive to testify falsely at trial

Erickson testified at the habeas hearing that immediately after his arrest he feared being charged with first-degree murder and facing life in prison or the death penalty. (HH Erickson 381). Erickson testified that when the detectives told Erickson that it would be his head on the "chopping block" he understood that statement to mean he could be executed for this crime. (HH Erickson 381-82). Likewise, when he met with his attorney, Mark Kempton ("Kempton"), Erickson was told that he needed to cooperate to prevent the prosecution from charging him with first degree murder. (HH Erickson 382).

Prosecutor Crane testified at the habeas hearing "In terms of the death penalty with respect to either of these co-defendants, that was never in play." (HH Crane 558). His testimony is contradicted by televised and videotaped media reports, aired at the time of Ryan's and Erickson's arrests, wherein Prosecutor Crane stated he had not decided whether to seek the death penalty. "Crane said he had made no decision about seeking the death penalty." (Pet. Exh. 112). Erickson's belief that he could possibly face the death penalty if he did not cooperate with law enforcement is credible because it is supported by recorded statements of Prosecutor Crane shortly after Erickson's arrest that the death penalty was being considered.

Moreover, contrary to the Attorney General's assertion in the proceeding below, the death penalty was still an available option at the time of Erickson's plea agreement. In August of 2003, the Missouri Supreme Court held that the execution of individuals under 18 years of age at the time of their capital crimes is prohibited by the Eighth Amendment. *State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (Mo. banc 2003). However, at the time of Erickson's plea the Missouri Attorney General had been granted a writ of certiorari to have that decision reviewed by the U.S. Supreme Court. *Roper v. Simmons*, 125 S.Ct. 1183 (2005). (Pet. Exh. 114). It was not until March of 2005, four months after Erickson entered into his plea agreement on November 4, 2004 that the U.S. Supreme Court likewise held that the Eighth Amendment prohibits execution of individuals who were under 18 at the time they committed their crime. *Id.* Prosecutor Crane could have sought the death penalty up until the United States Supreme Court decision in March of 2005.

Furthermore, Erickson was led to believe that Ryan would take a plea deal and testify against him. Walker, an inmate at the Boone County Jail, told Erickson that Ryan was going to do whatever he could to get out of it and put the crime on Erickson. (HH Erickson 303-04). Walker's statements were consistent with what police told Erickson, that is, if Erickson did not cooperate with them, Ryan would be able to tell his version of events and Erickson would be left as the primary perpetrator. Erickson was not told that Walker admitted that he had provided false information to him about Ryan's intentions to plead guilty or blame Erickson for the crime. (HH Erickson 303-04) (Pet. Exh. 100, 100a) (H.Dep. Miller 33-35).

Likewise, Erickson was provided with false police reports, prior to pleading guilty, that Ryan had made admissions about committing the crime. Specifically, in an interview with Arthur, she is reported as stating that Ryan told her that he and Erickson had "done something stupid" and that Ryan did not want to turn himself in. Erickson was never told that the report was fabricated, and that Arthur, in fact, never told police that Ryan admitted to "doing something stupid" with regard to the Heitholt murder. (H.Dep. Miller 15-30) (Pet. Exh. 100, 100a).

Erickson's habeas testimony is credible as to the reasons he pled guilty. Erickson's fear of a first-degree murder charge and possible execution provided a strong incentive to cooperate with the prosecution. Further, Erickson's belief that the Mallory, Arthur and Walker police reports were true all contributed to his guilty plea. The false information provided further motive for Erickson to accept a plea and testify falsely against Ryan.

vi. Erickson's alcohol-induced blackout explains his memory loss on November 1, 2001

Erickson's claim that his trial testimony was false when he claimed to remember Ryan and he committed the Heitholt murder, is new evidence. Erickson testified at the habeas hearing that on October 31, 2001 he snorted Adderall, ingested Adderall orally, snorted cocaine and drank alcohol from a keg. Erickson played drinking games at Ryan Swilling's house and was intoxicated by the time he left the party. (HH Erickson 274, 395). Erickson recalled drinking green drinks at By George, but had no memory of leaving the bar or going home. (HH Erickson 276).

While Erickson's habeas testimony that he fabricated his trial testimony is new, he has always reported his heavy alcohol and drug use the night of the crime. Erickson informed Dr. Delaney Dean that on the night of the murder he had consumed 9 or 10 drinks. Erickson admitted in his pre-trial deposition that he was "pretty intoxicated" by the time he arrived at the By George. (Pet. Exh. 109) (PT Dep. Erickson, 171). Erickson's claim that he consumed excessive amounts of alcohol and drugs is certainly not a recent fabrication and is supported by ample evidence in the record.

In 2006 the Attorney General conceded the evidence of Erickson's intoxication and blackout on the night of the murder. In its 2006 brief on Ryan's direct appeal, the Attorney General admitted, "Indeed, there was substantial evidence of Erickson's intoxication at the time of the murder, and the jury might have reasonably believed that Erickson had experienced what is commonly known as an alcohol-induced 'blackout,' and that Erickson simply does not recall his actions." (Pet. Exh. 120, p. 62). The

Attorney General also argued that the submission of a voluntary intoxication was proper because there was "ample evidence from which rational jurors could have inferred that Erickson . . . was voluntarily intoxicated." (Pet. Exh. 120, p. 40). The Attorney General pointed to the fact that Erickson testified at trial to drinking at a party and ingesting cocaine, then consuming more alcohol at the bar and feeling intoxicated. (Pet. Exh. 120, p. 44).

While evidence of Erickson's substance use has always been part of the record, Erickson's recantation in his affidavits and at the habeas hearing claiming that he lied at Ryan's trial when he testified that he experienced "repressed memories" that he later recovered, is new evidence. (TT 588, 798-799). Significantly, the prosecution's theory that Erickson had participated in this horrific crime, forgot about it for two years, and then recovered only certain memories of the crime, defies common sense and science, and explains why the prosecution had no memory expert to support its "recovered memory" theory at trial.

Prosecutor Crane argued to the jury that no one would plead guilty to a crime they did not commit and accept a 25 year sentence. However, a 25 year sentence for a guilty plea might seem like a good deal for a defendant who had no memory of what he was doing at the time of the murder because of a blackout; who became convinced by reading false police reports that he had been involved in the crime; who was told (falsely) that Ryan was about to enter a plea and testify against him; and who watched a television interview of the prosecutor stating he had made no decision concerning whether he would seek the death penalty. Indeed, Erickson testified at trial that even his own family

encouraged him to take a plea and testify against Ryan, and that failure to do so would result in Erickson serving a "substantially greater period of time." (TT 777, 787). Erickson is due to be released in 2016 so he will have served 12.5 years in prison. Erickson testified at the habeas hearing that he knew Ryan was already charged with first degree murder which could also result in a life sentence if not the death penalty. (HH Erickson 305). Erickson was not anxious to trade places with Ryan.

vii. Erickson's possible perjury charge and violation of plea agreement conclusively establish the credibility of his recantation

During his testimony at the habeas hearing, Erickson acknowledged that his recantation could subject him to a perjury charge and violation of his plea agreement. As noted, *supra*, a charge of perjury against Erickson would be a Class A felony. §575.040(7)(1), RSMo. 2000. The possible range of punishment for a Class A felony is not less than ten years and not to exceed thirty years, or life imprisonment. §558.011(1), RSMo. 2000.

Even more significant is that Erickson, by recanting his trial testimony, has, arguably, violated his plea agreement. The plea agreement is conditioned on Erickson's truthful and complete testimony. Failure to abide by the terms of the agreement renders it null and void. In the event the agreement is breached by Erickson, the State may recommend a different punishment on the charges he pled guilty to or may proceed to trial against him, possibly proceeding on first degree murder charges. (Pet. Exh. 121). Erickson testified that he was well aware that the State could deem the recantation of his trial testimony as a violation of his plea agreement. (HH Erickson 317).

The likely perjury charge and violation of the plea agreement conclusively establish the credibility of Erickson's recantation of his trial testimony. It is an undisputed fact that Erickson's recantation could subject him to new charges and a violation of his plea agreement that would result in a sentence years longer than the approximately 5 years he had left to serve under his plea agreement at the time of his habeas testimony. (HH Erickson 317). A likely perjury charge and violation of his plea agreement give Erickson's recantation inherent credibility. Just as the prosecution argued at trial that Erickson's trial testimony should be believed because he was pleading guilty to second degree murder and facing a twenty five year sentence, there is even more reason to believe his recantation because he is facing possible life imprisonment. There is no rational explanation for Erickson's recantations except that he lied at Ryan's trial about all of the evidence linking Ryan and him to the crime. All Erickson had to do was assert his constitutional right not to incriminate himself at the habeas hearing and his prior recantations would not be deemed reliable. He did not do this, which makes his recantation reliable.

In summary, Erickson's habeas testimony that he lied at trial when he testified that he remembered perpetrating the beating and murder of Heitholt with Ryan is credible. This is based not just on the inherent reliability of Erickson's recanting testimony, but on all of the evidence in the record. The recantation is corroborated by Erickson's inability to recall basic details about the murder when first interviewed by police; the numerous inaccurate and inconsistent statements Erickson made at trial; Erickson's extensive and well-documented drug and alcohol use; Erickson's heavy drug and alcohol use the night

of the Heitholt murder; and Erickson's motive to accept a plea agreement and testify falsely against Ryan. The credibility of Erickson's recantation is established by the fact that Erickson faces perjury charges for lying at Ryan's trial and re-sentencing under the terms of his plea agreement, subjecting him to possible life imprisonment rather than the 4 years he would have left to serve if he kept quiet. The great weight of the evidence supports the truth of Erickson's habeas testimony, which is that he perjured himself at trial when he testified to Ryan's involvement in the murder.

C. EVIDENCE LINKING MICHAEL BOYD TO THE MURDER OF KENT HEITHOLT

In considering Ryan's actual innocence and constitutional claims, this Court is able to assess the veracity of Ryan's conviction and the prejudice he has suffered in light of all the evidence now available. *See State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 126 (Mo. App. W.D. 2010) ("Justice requires that this Court consider all available evidence uncovered following [the petitioner's] trial that may impact his entitlement to habeas relief."); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. banc 2003) ("[T]he evidence supporting the conviction must be assessed in light of all the evidence now available."). In Missouri, it is well established that a defendant may present evidence that another person had an opportunity or motive for committing the crime if there is some evidence directly connecting that person with the crime. *State v. Chaney,* 967 S.W.2d 47, 55 (Mo. 1998). Here, there is direct evidence that Michael Boyd committed the murder for which Ryan was charged, and this Court may consider that evidence in assessing how a jury would decide Ryan's case in light of it.

1. The timeline of the murder establishes that Boyd was the only person with Heitholt when he was killed

Boyd testified at the habeas hearing that he was logged off his computer at 2:00 a.m. on November 1, 2001. (HH Boyd 505-506). He then gathered up his things and made his way toward the side exit. On his way out, Boyd had a conversation with Mike Henry, a janitor. (HH Boyd 506). Boyd exited the Tribune building at about 2:10 a.m. (HH Boyd 506). A little bit later, Heitholt exited the Tribune building and walked to his car. (HH Boyd 508-09). Boyd then stood next to Heitholt at his car and engaged him in a conversation. (H. Dep. Boyd Grp. Exh. 1, rpt. 18). According to Boyd, this conversation touched on a number of topics, including Boyd's preparation to go on the road to cover a high school football game (i.e., make sure Boyd had his recorder, notepads, laptop, etc.), potential stories and interesting players surrounding that football game, specific requirements for the story on the game, how to use the laptop, and more. (HH Boyd 511-512) (H. Dep. Boyd 62-63). Despite the fact Heitholt and Boyd had worked together for 5 hours that night, Boyd claims they reviewed all these work-related matters in the parking lot.

Boyd testified that he left the lot at 2:20 a.m.[11] (HH Boyd 515). He had a clock on his cell phone and in his car at that time. (H. Dep. Boyd 66). Boyd pinpointed his 2:20 a.m. departure time in his first interview with police at 3:30 a.m. on November 1,

[11] On cross-examination, the State attempted to get Boyd to say that he left at 2:15, but the best it could do was to elicit from Boyd that he knew "it was close to 2:20," but that he did not know the "exact time." (HH Boyd 538-539). On redirect, Boyd agreed that his memory was fresh when he spoke to Short on the morning of the murder and told him that he left at 2:20 a.m., and he again reaffirmed that "close to 2:20 was the exact time." (HH Boyd 541-542).

just 2 hours after the murder. (H.Dep. Boyd Grp. Exh. 1, rpt. 18). It is undisputed that Heitholt was with Boyd until Boyd left the parking lot.

Ornt went outside the loading dock at the Tribune building at about 2:20 am. to smoke a cigarette. (H.Dep. Baxley Grp. Exh. A, Pet. Exh. 105). She then saw a white male behind Heitholt's car. She went back in the building and told Trump what she saw. Trump opened the loading dock door, yelled toward the car, and observed two individuals rise up from behind the car. One of the two individuals yelled "somebody is hurt here, man" and both young men walked south towards the building where Ornt and Trump had stood, then turned east toward Fourth Street. (Pet. Exh. 105 Grp. Exh. A). Trump closed the door, considered calling the police, but then decided to walk outside, at which point the two individuals were "ambling" east down the alley toward Fourth Street. (HH Trump 208-218). Trump did not observe blood on these individuals or anything in their hands. (HH Trump 217-218). Clearly, calling out that someone was hurt would bring the authorities to the scene more quickly, which would not be a likely goal of a killer. And if the individuals wanted to avoid observation, they would have run (not walked) north out of the lot away from the Tribune building where Ornt and Trump had been standing. Trump approached Heitholt's car and saw Heitholt laying face down in a pool of blood. (HH Trump 218-219). He yelled to Ornt to call 9-1-1.[12] (HH Trump 219-220). The 9-1-1 call was received at 2:26 a.m. (TT 1062).

[12] Robert Thompson testified that Ornt and Trump came up to the sports area and told him and the others that there were two people by Kent's car and it looked like Kent was hurt. At that time, Thompson ran outside to find Kent's body. He then yelled to Ornt and Trump to call 9-1-1. It is undisputed that the 9-1-1 call was made at 2:26 a.m. (TT 1062, 1078-79).

It is undisputed that it took a minimum of 6-8 minutes for someone to murder Heitholt. (HH Blum 194). Dr. Adelstein, the pathologist who testified at trial, put a 10 minute timeline on the attack. (TT 1428). Therefore, Prosecutor Crane correctly told the jury in his closing argument that the murder started at around 2:12 a.m. (TT 2121), about eight minutes before Ornt came outside and then saw individuals by Heitholt's car. Boyd's testimony places him as the only person in the parking lot with Heitholt from 2:12 a.m. to 2:20 a.m. Boyd further testified that he saw two individuals walking in the alley at 2:20 a.m. west of the crime scene by 75 feet after he observed Heitholt entering his car head first, meaning Heitholt would have been inside the car when two individuals reached him. (H. Dep. Boyd 105). Clearly, these two individuals would not have been able to reach Heitholt and commit a 6-8 minute murder before Ornt came on the scene at 2:20 a.m if they did not reach the scene until 2:20 a.m. themselves. The timeline clearly shows the two individuals were only at the scene for seconds before Ornt arrived. These two could not have committed the murder. Boyd was the only one with Heitholt at the time of the murder.

2. Physical evidence connects Boyd to the murder

The physical evidence discovered at the scene eliminates Ryan and Erickson as the perpetrators. They were excluded from the DNA, shoe prints, and fingerprints found at the scene. However, the pieces of physical evidence below do connect Boyd to the murder. Despite the fact that Boyd was the last person to see Heitholt alive the police never obtained his fingerprints, shoe prints, or DNA to compare with the prints and DNA found at the scene. (HH Boyd 528-529) (Pet. Exh. 134). To this day Boyd has never

even been asked to provide his fingerprints or DNA despite his own testimony placing him at the scene when the murder occurred.

(1) A number of papers were found at the crime scene around and under Heitholt's car. (Pet. Exh. 130a-e). These papers include a Hickman High School girls' basketball schedule, which was found some distance from Heitholt's car, and a number of Columbia College basketball programs and schedules. Boyd covered high school basketball, including Hickman High, as well as Columbia College basketball. (H. Dep. Boyd 19-20; Pet. Exh. 131). Boyd commonly took "paperwork" home, including "[s]chedules as far as who was playing." (H. Dep. Boyd 49). Boyd did not have a bag to put his papers in; he just carried them in his hand. (H. Dep. Boyd 49). Heitholt, on the other hand, wrote columns focusing primarily on the University of Missouri, and did not cover high school basketball. Heitholt's articles did not focus on the games as much as what he called "the story within the story." (H. Dep. Boyd 24-25). Ryan's counsel has reviewed 117 columns written by Heitholt in the year leading to his death. Only five of those touched on high school sports, and even those did not "cover" a particular team. Additionally, Boyd has testified that on the night of the murder Heitholt was carrying only his laptop bag. (H. Dep. Boyd 57-58). According to Boyd, Heitholt had no papers in his hands during their alleged conversation. (H. Dep. Boyd 57-58, 64-65). The evidence indicates that the papers under the car belonged to Boyd, who covered Hickman high school basketball and Columbia College basketball and carried the papers loose in his hands because he did not have a bag. (H. Dep. Boyd 57-58).

There are additional items found on Heitholt's driver's seat that were clearly put there by the murderer after the attack. Heitholt's glasses are on the driver's seat, as well as a yellow notepad with blood smear on it. (Pet. Exh. 132a-d). The glasses had a lens broken during the struggle. The lens was found under Heitholt's car. (Pet. Exh. 133). The Columbia Police found that Heitholt's car door was closed when they first arrived at the scene but they found blood drops on the inside of the driver's-side door, indicating the door was open during the struggle. (HH Blum 191-92). Undoubtedly the perpetrator picked up some of the items from the ground such as the glasses and placed them on the driver's seat after the attack was completed. (Pet. Exh. 132). There was no blood detected on the driver's seat which would have indicated the attack occurred in the car, rather the blood was simply on the items on the driver's seat and was referred to as transfer blood by the officers. (Pet. Exh. 133). A leaf from the ground and the blood on the driver's seat items indicates these items were moved from outside the car to the driver's seat and the perpetrator closed Heitholt's door so the interior light would be off and he fled the scene. (Pet. Exh. 132a-b). These papers could easily have had Boyd's fingerprints or DNA on them, but he has never been asked to submit his DNA or fingerprints for a comparison. (HH Boyd 528-29) (Pet. Exh. 134).[13]

(2) Boyd admitted that on the night of Heitholt's murder, he made a "major mistake" on an assignment from Heitholt, causing a dispute. (H. Dep. Boyd 132-133). Specifically, Boyd selected a picture for a story about a women's softball team that

[13] Based on Ryan's counsel's review of the police reports in this case, it does not seem that the bag, the notepad, or other papers were tested for DNA despite clearly being placed in the car by the killer or being at the crime scene, and despite being quite susceptible to DNA and forensic analysis. (Pet. Exh. 138).

depicted the entire team, but Heitholt had requested photos of just two players and the coach. (H. Dep. Boyd 132-33). Because of Boyd's major error, Heitholt requested that Boyd call all eighteen players on the softball team and the coach to apologize. (H. Dep. Boyd 132-133). Before Boyd left, he made sure he had all the phone numbers he needed. (H. Dep. Boyd Grp. Exh. 1, rpt. 25). This dispute arising from Boyd's "major mistake" not only establishes a basis for confrontation between Boyd and Heitholt, it also explains the piece of paper found at Heitholt's side. The piece of paper contains a phone number with a 254 exchange, which is located in Williamsburg, a neighboring town to Columbia. (Pet. Exh. 130e).

3. Boyd has made a number of admissions connecting him to the murder

Boyd has made a significant number of incriminating admissions connecting him to the Heitholt murder throughout this case, a summary of which is provided below:

(1) Boyd admitted that he saw Heitholt's body face down and that he witnessed people turn Heitholt's body from face down to face up. (H. Dep. Boyd 71) (HH Boyd 521). It is undisputed that Heitholt was murdered face down and that his body was turned over at around 2:25 a.m. by two Tribune employees that came to his aid. (TT 1081-1082). Therefore, Boyd could not have seen Heitholt face down unless he saw him dead before 2:25 a.m. That Heitholt was face down is a "unique fact" known only by the killer and the two employees that immediately came to Heitholt's aid. Moreover, in order for Boyd to have seen the employees turn Heitholt onto his back, he would have had to have been near the scene watching the events just minutes after Heitholt's death. Boyd claimed he left the parking lot at 2:20 a.m. and drove straight home and did not return to

the Tribune building until about 4:15 a.m. when he learned that Heitholt had been killed. Therefore, it is apparent that Boyd observed the aftermath of the attack on Heitholt in order to confirm that Heitholt was dead. That Boyd lied about going home at 2:20 a.m . and was actually watching the events unfold at the scene is further corroborated by the fact Boyd testified that he saw paramedics and a lot of emergency lights at the scene. (H. Dep. Boyd 69-71). Detective Nichols, who was called to the scene at 2:30 a.m. testified that the paramedics were already gone when he arrived (TT 1119-1120, 1181), and the crime scene photos clearly show police cars with their emergency lights off. (Pet. Exh. 135).

The most likely explanation for Boyd lying about observing the scene immediately after the attack is that he was the perpetrator and was trying to determine if Heitholt was dead. This is corroborated by Boyd's memory of the phone call he had with Baer at around 3:30 a.m. the morning of the attack. Boyd specifically recalls that Baer never said Heitholt was dead until the end of the conversation when Boyd asked about where he could go see Heitholt. (H.Dep. Boyd 38-40). If Heitholt survived, he certainly would have been able to identify Boyd. According to Boyd's own testimony, he would have been home 10 minutes after the attack so he would not have been aware of anything happening in the parking lot at that time. (H.Dep. Boyd 69). The very fact that Boyd apparently drove out of the alley and around the block to observe the scene is compelling proof that he is the perpetrator because otherwise he would have kept going on his drive home. An innocent man would be unaware of anything happening after he left. A guilty man would know exactly what happened and would want to know if his victim was dead.

(2) To date, as detailed *infra* pp. 81-84, Boyd has provided five inconsistent statements regarding the night of the murder. Boyd's inability to provide a consistent story about his actions the night of the murder calls into question the veracity of his claim that he was not involved in Heitholt's death. (*See generally* H. Dep. Boyd; H. Dep. Boyd Grp. Exh. 1).

(3) Boyd admitted that he did not fill in a timesheet on the night of Heitholt's murder which documented the time he left although he was required to do so. (H. Dep. Boyd 81).

(4) Boyd testified that he cannot say for sure whether he drove his red car or blue car the night of Heitholt's murder. Boyd had the blue car destroyed in August 2004. (Pet. Exh. 124).

(5) Boyd admitted that he did not tell police that he had seen two individuals in the alley until after he heard a report stating that authorities believed two people were involved in the crime. (H. Dep. Boyd 97).

(6) Boyd did not see the two individuals in the alley until they were at the front of his car. (H. Dep. Boyd 103-105). Boyd was unable to give any type of description of these two individuals. (H. Dep. Boyd 115). This indicates that Boyd was fleeing the area with his headlights off.

(7) Boyd was "worried" when he saw the two individuals in the alley. He stated at one point that he was concerned that they would write down his license plate number. (H. Dep. Boyd 106).

(8) When Boyd arrived at his home at around 3:00 a.m. on November 1, 2001, he immediately washed his clothes. (H. Dep. Boyd 68).

(9) Apparently some Tribune employees went to the Major Crimes center after the murder. (TT 1087). Boyd, however, did not. Instead, he returned to the scene sometime around 4:15 a.m., in clean clothes. Boyd claims he saw a number of people in the building at that time, but does not recall a single conversation he had with anyone. (H. Boyd Dep. 71-73). Boyd is captured in a crime scene photograph taken by the police. (Pet. Exh. 136). Boyd is depicted peering out a door at the crime scene. No other Tribune employee is captured in the crime scene photos in such a manner. Boyd is wearing a sweatshirt despite temperatures in the sixties. The other employees in the earlier photographs are wearing short sleeved blouses and shirts. Boyd was never examined by the police for scratches, bruises or other signs of trauma that would connect him to the murder.

D. RYAN HAS ESTABLISHED HIS INNOCENCE BY CLEAR AND CONVINCING EVIDENCE

The physical evidence excludes Ryan as the murderer of Kent Heitholt. He was excluded as the contributor of the DNA obtained from the hair in Heitholt's hand; his fingerprints did not match those found at the crime scene; and the footwear impressions next to the body did not match his feet. The tire tool taken from the vehicle Ryan was driving the night of the murder was not the murder weapon, and no traces of blood were found in Ryan's car despite the fact that significant amounts of blood and blood spatter were found at the crime scene. Ornt, who worked with police to generate the composite

of one of the suspects, has testified that Ryan was not one of the two people she saw by Heitholt's car the night of the murder. (PCTr. 116). In other words, there has always been a significant amount of evidence refuting the prosecution's case against Ryan.

Now, in light of the admissions by Trump and Erickson that they committed perjury, confidence in Ryan's conviction has been fatally undermined. Indeed, Judge Green has held that Trump's habeas testimony that he lied when he identified Ryan is credible. And, Erickson's recantation is corroborated by his inconsistent, "exhaustively impeached" trial testimony which has always lacked credibility. In short, no rational jury would convict Ryan based on the State's complete lack of evidence against him.

The *Amrine* holding is directly applicable. In *Amrine* the Court held that although the evidence at trial was constitutionally sufficient to support the conviction, there was significant evidence indicating Amrine's innocence from the beginning such as the lack of physical evidence linking Amrine to the murder. "Instead, Amrine was convicted solely on the testimony of three fellow inmates, each of whom have now completely recanted their trial testimony." 102 S.W.3d at 548. The Court concluded, "This case thus presents the rare circumstance in which no credible evidence remains from the first trial to support the conviction. . . . As such, confidence in his conviction and sentence are so undermined that they cannot stand and must be set aside." *Id.* at 548-49. The Court reached this decision despite the fact that prior courts had determined two of the recantations to be unreliable. *Id.* at 551. The clear import of *Amrine* is that where physical and other evidence exists showing that the petitioner is innocent, and his

conviction rests solely on the testimony of witnesses who later recant their testimony under oath, confidence in the outcome has been undermined and relief should be granted.

Here, not only was there ample evidence supporting Ryan's claim of innocence at trial, but the only testimony against him has been credibly recanted. Consistent with *Amrine*, this Court should therefore grant relief.

CLAIM TWO

RYAN HAS ESTABLISHED THAT THE PROSECUTION USED TESTIMONY IT KNEW AND/OR SHOULD HAVE KNOWN TO BE FALSE AND THE KNOWING USE OF PERJURED TESTIMONY VIOLATED RYAN'S RIGHT TO DUE PROCESS.

It is well-settled that a conviction secured through the prosecutor's use of knowing perjured testimony violates the Due Process Clause of the Fourteenth Amendment. *See, e.g., United States v. Agurs*, 427 U.S. 97, 112 (1996); *Napue v. Illinois*, 360 U.S. 264 (1959); *United States v. Foster*, 974 F.2d 491, 494-95 (8th Cir.1988). It is also well-settled that a sentence obtained through materially false or misleading evidence violates the Due Process Clause and the Eighth Amendment. *Johnson v. Mississippi*, 486 U.S. 587 (1988); *United States v. Tucker*, 404 U.S. 443 (1972); *Townsend v. Burke*, 334 U.S. 736 (1948).

Missouri law likewise mandates relief from convictions based on perjured testimony. It would be patently unjust for a trial judge to refuse to grant relief in any case in which an accused was found guilty of a crime on the basis of false testimony, and the court, "if satisfied that perjury had been committed and that an improper verdict or

finding was thereby occasioned . . . would be under a duty to grant a new trial." *State v. Mooney*, 670 S.W.2d 510, 514 (Mo. App. E.D. 1984) (quoting *State v. Harris,* 429 S.W.2d 497, 500 (Mo. 1968)). Long ago, it was declared that "no verdict and resultant judgment, in any case, could be said to be just if the result of false testimony." *Donati v. Gualdoni*, 216 S.W.2d 519, 521 (Mo. 1948).

To establish a violation of due process based on the knowing use of perjured testimony, a defendant must prove that: (1) the at-issue testimony was false; (2) that the state knew it was false; and (3) that his conviction was obtained as a result of the perjured testimony. *State v. Albanese*, 9 S.W.3d 39, 50 (Mo. App. W.D. 1999). Under this required proof, the defendant must not only demonstrate that at-issue trial testimony was false, but that it was perjured. *Id.* For testimony to be perjured, it must not only be false, but must relate to a "material fact" in the case. *Id.*, citing §575.040.1 RMSo. 2000; *State v. Fletcher*, 948 S.W.2d 436, 438 (Mo. App. W.D. 1997). A fact is material, regardless of its admissibility, if it could substantially affect, or did substantially affect, the course or outcome of the cause, matter or proceeding. *Id.*, citing *Fletcher*, 948 S.W.2d at 438 (quoting §575.040.2 RMSo. 2000). To this materiality standard for determining perjured testimony, a court must overlay the materiality standard of *Brady* in determining if a due process violation occurred. *Id.*

Many perjured testimony cases refer to the prosecution's "knowing" use of perjured testimony, but it is clear that prevailing jurisprudence in this area does not require that the prosecutor himself actually knew he was presenting perjured testimony at the time the witness testified. Indeed, the U.S. Supreme Court has recognized that *Brady*

applies to a situation where the prosecution obtains a conviction based on perjured testimony when it knows or should have known of the perjury at the time of trial based on evidence in its possession, which had not been disclosed to the defendant. *Id.* (citing *U.S. v. Agurs*, 427 U.S. 97 (1976)). Additionally, due process requires that a conviction be overturned based on perjured testimony even if the perjured testimony was known only to police investigators and not the prosecutor. *Kyles*, 514 U.S. at 437-38.

A. THE PROSECUTION KNOWINGLY USED PERJURED TESTIMONY TO SECURE RYAN'S CONVICTION

Ryan has presented substantial evidence that the prosecutor knew or should have known that he was presenting perjured testimony through Trump and Erickson. As previously discussed, the impossibility of Trump's identification combined with Prosecutor Crane's knowledge of the false information being fed to Erickson, in addition to the numerous contradictory statements made by Erickson, make it virtually impossible for Prosecutor Crane not to have known both Trump and Erickson were lying.

At a minimum, Ryan has established that the police and prosecution investigator, and the prosecutor himself, acted in reckless disregard for the truth. It is well-settled that a petitioner sets forth a colorable due process violation if he can establish that the law enforcement agencies who investigated the case acted in reckless disregard of the truth. *Wilson v. Lawrence County*, 260 F.3d 946, 957 (8th Cir. 2001).

1. The evidence establishes that the prosecution knowingly used Trump's perjured identification at Ryan's trial

Trump has testified that during his meeting with Prosecutor Crane prior to trial, Crane told him that they were confident they had arrested the perpetrators and that it

would be helpful if Trump would identify them as being present at the scene. Regardless of whether this Court chooses to believe Trump's testimony, there is ample evidence supporting Ryan's claim that Prosecutor Crane either knew or should have known that Trump's "fantastic" trial testimony was false.

As discussed, *supra*, Trump's trial identification was predicated upon his receipt of a newspaper article with Ryan's and Erickson's photographs while Trump was incarcerated in the Missouri Department of Corrections. Yet Trump could not have received the article as he testified to at trial. Department of Corrections rules governing what type of mail inmates could receive at the time did not permit newspapers to be sent to inmates. As set forth above, the rule permitted clippings/enclosures up to 8-1/2 x 11. The rules also prohibited offender photographs.

Furthermore, contrary to Prosecutor Crane's representation to the trial court that Trump provided a "detailed" description of the individuals to police (TT 63), Officer Liebhart reported that Trump "could not provide a detailed description of either of the individuals" the night of the murder. (Pet. Exh. 104) (H.Dep. Liebhart Group Exhibit B). Thus, Trump did not assist police in creating the composite sketch of either of the individuals. And, because Prosecutor Crane viewed the scene from Trump's vantage point on the loading dock, it had to be clear that Trump could not have identified the individuals from 75 feet away, in the middle of the night, with only 10 seconds to observe them. (Pet. Exh. 75). Prosecutor Crane's use of trial exhibit 14A further distorted Trump's testimony because it was taken using a flash, from a location much closer to

Heitholt's car than where Trump was actually positioned on the loading dock. (HH Trump 211).

Other aspects of Trump's identification establish its falsity. Though Trump claimed he was sent the newspaper in March, 2004, he did not contact anyone when he allegedly recognized Ryan and Erickson. (HH Trump 247-48). That is, Trump, an imprisoned sex offender who allegedly had crucial information for the prosecution in a high profile murder case, told no one that he could identify two murderers until he was contacted by the prosecution eight months after he saw the pictures. According to Prosecutor Crane, contact was initiated by him and Haws when he directed Haws to contact Trump in prison. (HH Crane 596). No report was generated regarding this contact between the State and Trump. (HH Haws 658). During that contact Prosecutor Crane said that to his knowledge, Trump gave no indication he could identify the two individuals. (HH Crane 596-97). Still, Prosecutor Crane asked Trump to come to his office upon his release. After meeting with Prosecutor Crane and Haws, Trump was able to immediately make an identification. (HH Crane 598).

The Trump identification story also just happens to fit within the holding of *State v. Lawrence*, 700 S.W.2d 111 (Mo. App. E.D. 1985). In *Lawrence*, the defendant alleged that an identification procedure utilized with one of the witnesses that testified against him was unreliable because the witness had seen his photograph in the newspaper before the lineup. *Id.* at 114. The court rejected the defendant's argument because there was no governmental action involved with the initial identification. *Id.* Prosecutor Crane relied on *Lawrence* and argued that there had been no government involvement in Trump's

identification which was untrue. The trial court was never informed of the government involvement that occurred when Haws and Prosecutor Crane talked to Trump in prison prior to his release. The concealment of this critical fact resulted in the trial court not applying the "balancing test" the defense requested to challenge Trump's identification. (TT 62, 1016-17). It is difficult to believe that the Trump newspaper story originated from a janitor, with no legal training, rather than from an attorney with knowledge about the legal standards governing identification procedures. In particular, Trump's trial testimony about unfolding the newspaper in a manner that allowed him to see the photographs before the headlines suggests knowledge possessed by a prosecutor and not a janitor.

The only disputed issue is what transpired in Prosecutor Crane's office between Crane and Trump. Specifically, the issue is whether Prosecutor Crane's story, wherein Trump set forth the newspaper story, is to be believed, or whether Trump's testimony is true that Prosecutor Crane showed the newspaper pictures to him and requested that he help the prosecution by testifying that he could identify Ryan and Erickson from the article as being present at the crime scene. It is clear that Trump's recantation is reliable and his trial testimony is not credible.

Trump's claim that Prosecutor Crane encouraged him to falsely implicate Ryan is consistent with the testimony of other witnesses. Significantly, every witness who, according to Erickson's trial testimony, would be able to offer corroboration of the prosecution's theory of the case, has testified that they were pressured to implicate Ryan. Shawna Ornt testified at Ryan's Rule 29.15 motion that when she met with

Prosecutor Crane prior to trial she told him that Ryan was not one of the people she saw by Heitholt's car. In response Prosecutor Crane told her she was wrong, that he knew Ryan and Erickson were guilty, and tried to convince her to identify them. (PCTr. 119-120). Ornt's allegations bear striking resemblance to those made by Trump.

Dallas Mallory, who per Erickson's trial testimony encountered Ryan and Erickson after the murder in downtown Columbia, likewise testified that the police "screamed" at him and would not let him leave when he denied seeing Ryan and Erickson that night. (PCTr. 271-72). Later, Prosecutor Crane and Haws told Mallory he was lying and that he knew something they wanted to hear. (PCTr. 276). Dallas denied seeing Ryan or Erickson in downtown Columbia that night. In fact, Mallory did not have a license or a car, so he would not have been driving a vehicle as Erickson testified at trial. (PCTr. 267-68, 271-73) These witnesses are not connected to each other and have no motive to falsely accuse law enforcement of pressuring them.

Prosecutor Crane's representations to the court and the manner in which he conducted his cross examination of Trump undermine his credibility. Namely, his representation to the trial court that Trump had provided "a detailed description" of the alleged perpetrators (TT 63), is untrue. Prosecutor Crane's use of trial exhibit 14(A) at trial and his concealment from the trial judge of the fact that the prosecution contacted Trump while Trump was still in prison also undermine Prosecutor Crane's credibility. Significantly, Prosecutor Crane used careful leading questions to elicit testimony from Mr. Trump indicating he had not been contacted by the prosecutor's office while in prison:

[Crane]: Okay. Sir, after you were released, you were contacted by my office -- I believe you were contacted by Bill Haws?

[Mr. Trump]: Correct. (TT 999).

Most important, however, is that Prosecutor Crane concealed evidence that would have impeached Trump's identification. Prosecutor Crane's investigator, Haws, testified at the habeas hearing that when he and Prosecutor Crane met with Trump, Trump told them that his wife had sent him the article which led to his alleged identification of Ryan. (HH Haws 667). Haws testified that after the meeting he interviewed Barbara Trump. At that time Barbara Trump told Haws that she had no memory of sending her husband the article with Ryan's and Erickson's photographs. (HH Haws 667). This information was not disclosed to the defense, because Haws never drafted a report regarding the interview. (HH Haws 668).

While the prosecution's failure to disclose the information obtained by Haws is a *Brady* violation in and of itself sufficient to justify habeas relief (see *infra*), Prosecutor Crane's knowledge that Trump's wife refuted Trump's version of events also serves as proof of his knowing use of perjured testimony. *State v. Albanese*, 9 S.W.3d 39, 50 (due process is violated where the prosecution obtains a conviction based on perjured testimony when it knows or should have known of the perjury at the time of trial based on evidence in its possession not disclosed to the defendant).

Judge Green, in finding that Trump committed perjury when he identified Ryan at trial, held that Trump's story regarding the newspaper was "simply too fantastic to be believed." (Pet. Exh. 116, p. 17). Yet Prosecutor Crane presented that unbelievable

testimony at Ryan's trial, all the while Barbara Trump had told his own investigator that she had no memory of sending Trump the very article that served as the entire basis for his identification. Prosecutor Crane also represented to the trial court that Trump's wife sent him the article without disclosing that Mrs. Trump had told Crane's investigator she had no recollection of doing so. (TT 1017). Ryan's right to due process was thus violated by Prosecutor Crane's use of testimony he knew and/or should have known to be false.

2. The evidence establishes that the State manipulated Erickson with false evidence into thinking he committed the Heitholt murder

It is highly significant that the prosecution did not call five witnesses at Ryan's trial, yet false police reports were created attributing information to these witnesses and given to Erickson by the prosecution in preparation for his trial testimony. (HH Erickson 373). Erickson recently learned these witnesses now claim their police reports are false. Until he learned of the falsity of these reports Erickson believed he was guilty.

A review of the false information given to Erickson is necessary to understand the prosecutor's strategy of convincing Erickson he was guilty even though he had no memory of the murder. The evidence demonstrates that false police reports were generated by the police and Haws to convince Erickson he was guilty. Prosecutor Crane then told the jury that Erickson had a traumatic event and lost his memory of the murder, and then selectively regained his memory as an explanation for Erickson's memory gaps. (TT 2120).

1) **Meghan Arthur**: Erickson thought Arthur had provided incriminating information against him and Ryan. Erickson testified at the habeas hearing that it was only recently that he learned the police made up her story. (HH Erickson 345-46) (H.Dep. Miller 14, 18, 21, 22, 26) (Pet. Exh. 100a).

2) **Richard Walker**: Erickson was told Walker made a video statement that Ryan had made incriminating statements about him. (HH Erickson 303). Also Erickson testified that he was told by Walker that Ryan "was going to try to do whatever he could to get out of it and put it on me." *Id.* at 303-04. Erickson only recently learned that Walker had admitted that he lied about what Ryan supposedly told him. *Id.* at 343. The deposition of Investigator Jim Miller ("Miller") establishes that Walker's statements implicating Ryan, as indicated in police reports, are false. (H.Dep. Miller 28-30) (Pet. Exh. 100a).

3) **Dallas Mallory**: Based on police reports Erickson believed that Mallory placed he and Ryan in downtown Columbia after the murder. At the habeas hearing Erickson testified that "Dallas Mallory was saying that he saw me leaving the scene and that I had something in my hand and told -- he said that I told him that, you know, I killed a guy, I guess." (HH Erickson 304). Erickson did not realize that Mallory had disputed what the police reported he had told them at the time of Erickson's trial testimony. Erickson testified at the habeas hearing that his belief that Mallory had implicated him is part of what led him to believe he had been involved in the murder. (HH Erickson 350).

4) **Michael Boyd**: Erickson said that his testimony about hiding behind the dumpster and waiting "as a red car pulled off of the lot" came from reading the police

reports before Ryan's trial which included the false report of Haws' interview with Boyd on July 24, 2005. (HH Erickson 372) (HH Boyd 526-27). Erickson's interview with Haws is in the same report dated July 25, 2005 even though Haws claims he interviewed Erickson on June 24, 2005. (Pet. Exh. 108) (H.Dep. Boyd Grp. Exh. 3). During that interview Erickson for the first time described hiding behind the dumpster with Ryan and waiting until a red car pulled off the lot. (HH Erickson 372) (HH Boyd 527) (TT 827). At Ryan's trial Erickson was unable to keep the false story straight and testified the man exited the building after Heitholt, not before as Boyd reported to police and testified at the habeas hearing. (TT 826) (HH Boyd 509). Erickson testified at trial that the man was "white" and of "medium build." (TT 827). Boyd is a large African American male who left the building before Heitholt. (TT 827) (HH Boyd 509).

5) **Nick Gilpin**: Erickson was asked the following question by Respondent during the habeas hearing: "You told him you hit the victim, that Ryan Ferguson had strangled him, and you told the cleaning lady to go get help. You remember telling Nick all of these things?" Erickson responded: "I don't remember telling him the cleaning lady. All I remember saying is that, you know, we might have beaten and strangled somebody, because I read it in the paper. And, like, it was real weird because, like, I could be like, well, I don't really remember, but I didn't kill him but -- I don't know, man. I was really messed up. But basically that's kind of what I tried to portray and I basically tried to put it on Ryan. And I didn't really want to commit to it too much, which was how this whole people saying that I think I had a dream thing, because --" (HH Erickson 378-79). One can infer that if Gilpin could have corroborated Erickson's trial testimony he would have

been called at trial. See *Robnett v. St. Louis University Hospital*, 777 S.W.2d 953, 956 (Mo. App. E.D. 1989) (the failure of the prosecution to put on such key witnesses raises an inference that the witness' testimony would not have been favorable to the prosecution); *Bauer v. Bauer*, 38 S.W.3d 449, 459-60 (Mo. App. W.D. 2001).

Once again, the prosecution engineered testimony it knew and/or should have known to be false. As described throughout this petition, Erickson made numerous contradictory statements to police regarding his involvement in the murder. Furthermore, Erickson made several statements that were inconsistent with the physical evidence gathered at the scene. Every single detail about the murder which only the killer would know was provided to Erickson by law enforcement. Meanwhile, Erickson was fed false information which convinced him that he had, in fact, been involved in the murder, and that if he did not accept a plea agreement to testify against Ryan then Ryan would likely testify against him. The manipulation of Erickson, in combination with the lack of evidence against him and Ryan, forces the conclusion that the prosecution knew and/or should have known that Erickson's testimony was false.

3. The evidence demonstrates that the prosecution failed to correct testimony known by it to be false

A conviction obtained through the use of false evidence, known to be such by the State, must fall under the Fourteenth Amendment; the same result obtained when the prosecution, although not soliciting false evidence, allows it to uncorrected when it appears. *Napue v. Illinois*, 360 U.S. 264 (1959). Here, Ryan was convicted through the use of false evidence in that the jury was not advised that the prosecution made contact

with Jerry Trump while Trump was incarcerated. (TT 999). The jury was told Trump simply visited Prosecutor Crane after his release and told Crane he could identify Ryan. (TT 1027). However, it is now undisputed that the prosecution called Trump while he was still in prison. Such State action was not disclosed to the trial judge or jury.

Further, during the direct examination of Erickson by Prosecutor Crane, Erickson testified that Ryan had called him a few months after the murder. Per Erickson's trial testimony, Ryan told Erickson that his father had discovered the victim's wallet. Erickson testified that Ryan's dad woke him up "strangling [him] a bunch of times." (TT 588-89). Prosecutor Crane elicited this testimony from Erickson, and allowed the jury to draw inferences from it, despite the fact that Crane knew that the wallet had been discovered in the victim's car. (TT 1176). It is clear the wallet story that the prosecution presented at trial, by way of Erickson's testimony, was false and the prosecution knew it was false.

Thus, not only did Prosecutor Crane elicit testimony he knew or should have known to be false, but he allowed false and misleading testimony to be presented to the jury without correction.

B. THE KNOWING USE OF PERJURED TESTIMONY REQUIRES THAT THE WRIT BE GRANTED

Jerry Trump provided the only corroboration of Erickson's impeached trial testimony. Yet Prosecutor Crane either knew and/or should have known that Trump's identification of Ryan was perjured. Trump was unable to provide a detailed description to police; he could not have received the article as he testified to; he did not report the

identification immediately after he allegedly received the article; and any investigation at the scene would have shown that Trump could not have made the identification he purported to make at trial.

Prosecutor Crane knew that Barbara Trump had no recollection of sending the article to Trump, and that fact was never disclosed to the defense. Moreover, the prosecution contacted Trump while he was still incarcerated (at a time when he would have been more susceptible to pressure from law enforcement and/or anxious to assist the prosecution in its case), and that contact was never disclosed to the defense. Prosecutor Crane allowed Trump to perjure himself by testifying that his initial contact with the prosecution's office came after Trump was released.

Meanwhile, Erickson was given false police reports to convince him he was guilty. Erickson was told by Walker that Ryan was going to testify against him, so Erickson decided to testify falsely. Prosecutor Crane knew and/or should have known that this false information would prompt Erickson to testify falsely, especially given that the physical evidence excluded Ryan and Erickson, and Erickson had given inaccurate information to police. Similarly, Prosecutor Crane failed to correct Erickson's testimony about Ryan having the victim's wallet, knowing that the wallet was left at the scene in Heitholt's car.

Based on the knowing use of perjured testimony, and the failure to correct testimony the prosecution knew to be false, habeas relief is warranted.

CLAIM THREE

RYAN'S CONVICTION VIOLATES DUE PROCESS OF LAW BECAUSE THE PROSECUTION WITHHELD EXCULPATORY AND IMPEACHMENT EVIDENCE PRIOR TO AND DURING TRIAL THAT UNDERMINES CONFIDENCE IN THE OUTCOME OF RYAN'S CRIMINAL TRIAL

Missouri Supreme Court Rule 25.03 provides that upon written request the State shall disclose to the defense any material within its possession or control that tends to negate the guilt of the defendant as to the offense charged. Under the rule prosecutors have an affirmative duty, in the necessary exercise of due diligence, to learn of evidence in the possession of "other government personnel," which may comply with Rule 25.03 requirements. *Merriweather v. State*, 294 S.W.3d. (Mo. banc 2008); *Kyles v. Whitley*, 514 U.S. 419 (U.S. 1995). A failure to comply with the rule is not an error that can be made in good faith. *Taylor v. State*, 262 S.W.3d. 231 (Mo.banc 2008).

Likewise, *Brady v. Maryland* holds that it is a violation of due process for the prosecution to suppress requested evidence that is favorable to an accused where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith motives of the prosecution. *Merriweather v. State*, 294 S.W.3d 52, 54 (Mo. banc 2009) (quoting *Brady*, 373 U.S. at 87, 83 S.Ct. 1194). To prevail on a *Brady* claim, a petitioner "must show each of the following: (1) the evidence at issue is favorable to him, either because it is exculpatory or because it is impeaching; (2) the evidence was suppressed by the State, either wilfully or inadvertently; and (3) he was prejudiced."

Koster v. McElwain, 340 S.W.3d 221, 251 (Mo. App. W.D. 2011) (citing *Engel v. Dormire*, 304 S.W.3d 120, 126 (Mo. banc 2010)).

If a petitioner establishes a *Brady* violation, he has established cause and prejudice sufficient to overcome any procedural default for having failed to raise the claim in prior proceedings. *Engel*, 304 S.W.3d at 129. This is because "cause" is established by the suppression of *Brady* material (*Amadeo v. Zant*, 486 U.S. 214 (1988)), and the analysis of "prejudice" is identical to the analysis of prejudice in a *Brady* claim. *Griffin v.Denney*, 347 S.W.3d 73, 77 (Mo. banc 2011).

In determining prejudice, the United States Supreme Court has stated: "A showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles v. Whitley,* 514 U.S. 419, 434 (1995). Rather, to be entitled to a new trial under the *Brady* standard, a defendant must show "a 'reasonable probability' of a different result," *id.*, which means:

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial.

Id. (Internal quotations omitted); *accord Griffin,* 347 S.W. 3d at 77. "When reviewing a habeas petition premised on an alleged *Brady* violation, this Court considers all available evidence uncovered following the trial." *Griffin,* 347 S.W. 3d at 77.

This Court need not determine whether it agrees that each *Brady* violation considered in isolation has a sufficiently prejudicial effect to entitle Ryan to a new trial. In *Griffin,* the Court noted that in deciding whether the prejudice shown by *Brady* violations is sufficient to determine that the prior verdict is not "worthy of confidence," a court should consider the effect of all of the suppressed evidence along with the totality of the other evidence uncovered following the prior trial. *Griffin,* 347 S.W. 3d at 77. Therefore, the effect of all of the *Brady* violations, as well as the effect of the other pieces of recently discovered evidence, should be considered in determining whether the prior verdict is no longer "worthy of confidence." *Id.*

A. BARBARA TRUMP

Ryan's right to due process was violated as the result of the prosecution's failure to disclose crucial evidence that would have impeached Jerry Trump's fabricated identification of Ryan. At the habeas hearing Haws, Prosecutor Crane's investigator, testified that during the course of preparing for Ryan's trial he interviewed Barbara Trump, Trump's wife. Per Trump's (now known to be false) trial testimony, his wife sent him a newspaper article following Ryan's and Erickson's arrests which served as the basis for his alleged identification of Ryan. Haws admitted when he testified at the habeas hearing that prior to the trial, he asked Barbara Trump if she had sent Trump a newspaper about the Heitholt case when he was in prison. (HH Haws 667). Mrs. Trump told him she did not recall sending the article to him. (HH Haws 667-68).

Haws admitted that he did not prepare a report reflecting Mrs. Trump's statements. (HH Haws 668). By way of affidavit, Charles Rogers, Ryan's trial attorney, testified that

Barbara Trump obviously would have been called as a witness at trial to rebut the prosecution's claim that she sent Trump the newspaper had the information been provided to him. (Pet. Exh. 113, para. 9-14).

B. MICHAEL BOYD

Michael Boyd was a critical witness to the Heitholt homicide. He is the last known person to see the victim alive. In fact, Boyd has placed himself in the Tribune parking lot when the murder occurred. Yet, Boyd was not called to testify at trial by either side. This is because the prosecution did not disclose crucial evidence that would have linked Boyd to the murder and excluded the two boys seen at the scene. Also, this evidence would have provided further impeachment of Erickson's trial testimony.

1. Michael Boyd's inconsistent, contradictory statements

Boyd repeatedly contradicted himself as to what transpired in the parking lot. When he was first interviewed, Boyd told Detective Short that he talked to Heitholt while standing by Heitholt's car and then proceeded to his own car. (Pet. Exh. 108) (H.Dep. Boyd Grp. Exh. 1). However, in subsequent interviews Boyd stated that he entered his car before Heitholt exited the Tribune, then drove up next to Heitholt to speak with him. (Pet. Exh. 108) (H.Dep. Boyd Grp. Exh. 1). In an interview with Officer Simons, Boyd stated he sat in his car for a couple of minutes adjusting the radio then observed Heitholt. (Pet. Exh. 108) (H.Dep. Boyd Grp. Exh. 1). He started his car, backed up, headed south towards the building, rolled down his driver's side window and spoke to Heitholt. (Pet. Exh. 108) (H.Dep. Boyd Grp. Exh. 1). In a later interview with Investigator Jim Miller, Boyd stated he went to his vehicle, listened to a cassette tape and saw Heitholt exit the

building. (Pet. Exh. 108) (H.Dep. Boyd Grp. Exh. 2). Boyd then pulled out, headed towards the building, made a U-turn in the lot and pulled up next to Heitholt and spoke to him through the passenger's side window. (Pet. Exh. 108) (H.Dep. Boyd Grp. Exh. 2). Boyd also stated he "observed Heitholt's car tail lights come on" and that Heitholt drove off the lot as Boyd was driving off the lot headed north. (Pet. Exh. 108) (H.Dep. Boyd Grp. Exh. 2).

Boyd also was inconsistent as to whether he saw anyone else in the lot. Boyd initially told Short and Simons that he did not see anybody around the parking lot or anybody who looked suspicious. (Pet. Exh. 108) (H.Dep. Boyd Grp. Exh. 1). After Ryan's and Erickson's arrests, Boyd allegedly told Haws that as he was headed west down the alley he saw "two white guys" standing near the dumpsters. (Pet. Exh. 108) (H.Dep. Boyd Grp. Exh. 3). Boyd later told Kirby that he nearly hit the two individuals as he drove west down the alley. The individuals were walking down the alley not standing or hiding behind the dumpster. (Pet. Exh. 123, para. 9(h)). Boyd also admitted to Kirby that he thought he told police that he heard music coming from By George the night of the murder, but later stated he may have just read that in the newspaper. (Pet. Exh. 123, para. 9(i)).

Boyd also gave inconsistent statements regarding what car he was driving that night. On February 14, 2005, Boyd told Investigator Miller that he was driving his blue Oldsmobile Cutlass Ciera. (Pet. Exh. 108) (H.Dep. Boyd Grp. Exh. 2). He told Miller that he still owned the car as of that date. (Pet. Exh. 108) (H.Dep. Boyd Grp. Exh. 2). Then, on July 24, 2005, Boyd told Haws that he was driving his wife's red Plymouth

Acclaim the night of the murder. (Pet. Exh. 108) (H.Dep. Boyd Grp. Exh. 3). Boyd later advised Kirby that he traded in the blue Oldsmobile in 2004. (Pet. Exh. 123, para. 9(j)). The police never made any effort to locate and/or search Boyd's vehicle after the murder. Subsequent investigation has shown that, in fact, the Blue Oldsmobile was destroyed in August, 2004. (Pet. Exh. 124). The car was never tested for Heitholt's blood or DNA.

Moreover, it is now known that Boyd returned to the scene of the murder that night. (HH Boyd 519-20). Boyd testified that he arrived at 4:15 or 4:30 a.m. (HH Boyd 520). Boyd testified that when he arrived, Heitholt's body was face down and he watched as Heitholt's body was turned face up by two employees. (HH Boyd 521). Boyd also observed paramedics at the scene. This is hugely important because it means he left the parking lot at 2:20 a.m. and went around the corner to watch the activities at the crime scene. All of the activities Boyd observed occurred by 2:30 a.m., not at 4:00 a.m. Boyd's observations demonstrate his untruthfulness and shows a consciousness of guilt. (H.Dep Boyd 72) (HH Boyd 521). When Heitholt was discovered by Tribune employees minutes after his death, but prior to the 9-1-1 call at 2:26 a.m., they rolled Heitholt over so he was face up. (TT 1082-83). Only the killer and the witnesses at the scene, before the 911 call, knew that the body was originally face down. It is undisputed that Heitholt was face down when he was strangled.

Despite Boyd's presence at the scene of the murder at the time of the murder between 2:12 to 2:20 a.m. and despite his alarmingly inconsistent statements, Boyd was never investigated as a suspect. None of the clothing Boyd wore that night was collected or tested for blood or DNA. His vehicle was never searched for blood or trace evidence.

Boyd's fingerprints were never compared to those recovered from Heitholt's vehicle, and his shoes were never compared to the footwear impressions at the scene. Boyd's DNA was also never compared to the hair recovered from Heitholt's hand. Boyd admitted that he had a dispute with Heitholt the night of the murder because Boyd made a "major mistake" on an assignment from Heitholt. (H.Dep. Boyd 132-33) (HH Boyd 511-12). This dispute was never explored.

2. Boyd's interview with Short was not disclosed to the Defense

Within a year after the murder, Boyd learned from the media that the police were searching for two white males in relation to the murder. (HH Boyd 525-26). Upon learning this Boyd went to the police department and met with Short. (HH Boyd 524-25). For the first time Boyd advised Short that as he left the lot the night of the murder at about 2:20 a.m., he saw two individuals walking in the alley. (HH Boyd 524, 541). Boyd saw the two individuals "right after [he] left" and they startled him. (HH Boyd 514, 525). In prior interviews Boyd stated he feared the two had seen his license plate. (H.Dep. Boyd 114-15). The two individuals were not hiding behind the dumpster wall that ran north and south, they were walking by the east/west dumpster wall a "good ways" from the crime scene and they were not hiding at all. (HH Boyd 513-14, 532). Boyd reported they were acting casual and not doing anything suspicious. Boyd could not provide any details to Short as to their gender, race or color. (HH Boyd 515, 525, 527).

None of this information was provided to the defense by the prosecution. (Pet. Exh. 113). Significantly, the Respondent below did not call Short to refute Boyd's

testimony at the habeas hearing. Boyd was not called as a witness by either side at trial. The timeline provided by Boyd was totally exculpatory for the two white boys who came upon the scene after the murder and directly connected Boyd to the crime scene while the murder was occurring. Prosecutor Crane established that the attack on Heitholt started at 2:12 a.m. (TT 2121). The attack ended before Ornt was on the scene at around 2:20 a.m.

C. KIM BENNETT

The prosecution also violated Ryan's right to *Brady* material where it failed to disclose that a witness saw Ryan and Erickson leave the bar when it closed at 1:30 a.m., get into Ryan's car and drive away. Kim Bennett ("Bennett"), a medical assistant and nursing student, testified that she grew up in Columbia and graduated from high school in 2004. (HH Bennett 461). Bennett recalled the night of October 31, 2001. (HH Bennett 461). That night she and a friend, Amanda, went to By George bar to see another friend, Bernard, who was DJ-ing. (HH Bennett 461). Bennett knew Ryan, and he was one of the people she saw in the bar that night. (HH Bennett 462). Bennett testified that Ryan said hello and introduced his sister to Bennett and Amanda. (HH Bennett 463-64).

Bennett testified that at around 1:00 a.m. the bar began to close and she walked with Amanda out to the parking lot. (HH Bennett 464). At that time they were waiting for Bernard to pack up his supplies to say goodbye to him. (HH Bennett 464). As Bennett and Amanda were standing in the parking lot talking, she saw Ryan and Erickson walk by. (HH Bennett 465). Ryan said something like, "see ya" and they started walking to their car. (HH Bennett 465). Bennett testified she saw them get into Ryan's car. (HH

Bennett 466). At no time did they open the trunk. She then witnessed them drive away. According to Bennett this occurred at approximately 1:30 a.m. (HH Bennett 466).

Bennett further testified that a few weeks after Ryan's arrest, two police officers came to question her and Amanda to determine if they knew anything regarding the murder. (HH Bennett 471). Bennett provided the officers with the information about Ryan and Erickson being at the bar. *Id.* She told the officers that she saw Ryan and Erickson walk out the bar, cross the street and leave in Ryan's car. (HH Bennett 472). She also told them that she left at about 1:45 a.m. when the bar closed. (HH Bennett 472). At that time the officers appeared to be writing things down. (HH Bennett 472). The information Bennett provided was never disclosed to the defense. (Pet. Exh. 113, para. 15-24).

D. RYAN WAS PREJUDICED BY THE STATE'S FAILURE TO DISCLOSE THE MATERIAL, EXCULPATORY EVIDENCE

Ryan was clearly prejudiced by the prosecution's failure to disclose the aforementioned evidence.

Trump was critical to the prosecution's case, because his identification provided the only corroboration of Erickson's trial testimony. Trump allegedly was able to identify Ryan after seeing his photograph in a newspaper article that he testified his wife, Barbara Trump, mailed to him. It is difficult to conceive of any more powerful evidence that Trump's testimony was false than an admission from Barbara Trump that, in fact, she did not recall ever sending the article to Trump in the first place.

In determining whether the suppressed impeachment evidence was material, a court must assess not only the ways that the witness was impeached, but also the ways that he was not impeached that would have been available had improperly suppressed evidence been disclosed. *Engel*, 304 S.W.3d at 128.

1. Short's interview with Barbara Trump would have impeached Trump's identification

As a result of the prosecution's failure to disclose the fact that Barbara Trump had no recollection of sending Trump the article, Ryan was completely unable to discredit the alleged basis for Trump's identification, i.e., that he received the article during his incarceration. Also the concealment of the telephone call of Prosecutor Crane and Haws would have established the government involvement that the defense needed to establish to challenge the Trump identification. Given the importance of Trump's testimony, the failure to disclose this evidence undermines confidence in the verdict.

2. Boyd's undisclosed statements would have discredited the Prosecution's timeline

The Boyd statements were material to refute the State's timeline and establish a solid alibi for the two individuals that Boyd reported seeing because they had no time to commit the murder. In *Buchli v. State*, 242 S.W.3d 449 (Mo. App. W.D. 2007), this Court addressed a similar factual scenario and quoted the following excerpt from *State v. Parker* as the relevant standard:

> Precisely where the *Brady* standard of materiality lies—somewhere between the newly-discovered evidence standard and the "harmless error" standard—is difficult to formulate. It appears to us, however, that the United States Supreme Court would have us ask whether or not the undisclosed evidence would have been significant to the

> defendant in the way that he tried his case: Would it have provided him with plausible and persuasive evidence to support his theory of innocence or would it have enabled him to present a plausible, different theory of innocence? If either question can be answered affirmatively, the evidence is material under a *Brady* analysis.

State v. Parker, 198 S.W.3d 178, 180 (Mo. App. W.D. 2006). The *Buchli* Court determined that information that the State's timeline indicating that the defendant had 8 ½ minutes to complete the murder, hide evidence, clean himself, and leave, was altered. *Buchli*, 242 S.W.3d at 454-55. In fact, the State suppressed evidence showing that there was a less than four minute window in which all these acts had to occur. *Id.* This Court held, "Although the jury was free to believe that [the defendant] could have done all of these acts in less than four minutes, [the defendant] conceivably could have used [the suppressed evidence] to persuade the jury that the 'time window' was too brief." *Id.* at 455. Therefore, the suppressed evidence put the case "in such a different light and 'undermine[d] the confidence in the verdict.'" *Id.*

Here, the State argued that Ryan made a phone call at 2:09 a.m. and then he and Erickson subsequently walked to the Tribune building, which takes about 3 minutes and 20 seconds, and hid behind a dumpster. (TT 2121). This timeline placed Ryan and Erickson behind the dumpster at 2:12 a.m. Boyd, however, established that the two individuals were not at the crime scene until 2:20 a.m. or shortly thereafter. This is 8 minutes later than the timeline provided by the State. Moreover, Boyd established that the individuals were not hiding behind the dumpster wall, as the State claimed.

According to Boyd, Heitholt was still alive and getting in his car at 2:20 a.m. (HH Boyd 514). Ornt exited the Tribune building to smoke at 2:20 a.m. and thereafter saw

individuals near Heitholt's car for the first time. She did not observe Boyd exiting the lot. (H Boyd 515, 538, 541) (H.Dep. Baxley Grp. Exh. A) (Pet. Exh. 105). Taken together, Boyd's statement placed the two individuals in the alley at least 25 yards away at 2:20 a.m. as Heitholt was entering his car, making it impossible for those individuals to have committed the crime. The Boyd and Ornt timelines would leave a minute or less for the two boys to have committed the murder. Undisputed evidence at the habeas hearing established that the attack took a minimum of between 6 and 8 minutes. (HH Blum 194). Thus, like in *Buchli*, the defense "conceivably could have used [the Boyd statements] to persuade the jury that the 'time window' was too brief" and that the only explanation is that Boyd killed Heitholt between 2:12 and 2:20, then left the scene and saw the two individuals in the alley, who eventually came upon Heitholt's body and called for help. (Pet. Exh. 113).

Additionally, the suppressed Boyd statements would have been used to impeach Erickson. Erickson testified that he and Ryan hid behind the dumpster immediately prior to the attack. (TT 522-523). Erickson clearly did not testify that he and Ryan hid behind the dumpster, then walked down the alley as Boyd drove past, and then returned to Heitholt's car as Heitholt was entering his car but before Ornt was on the scene. Had the defense been advised of the statement it would have been able to impeach Erickson's account of what happened at the exact time of the attack. (Pet. Exh. 113).

3. Bennett's statements would have contradicted and impeached Erickson's testimony

Similarly, evidence from an unbiased, independent witness, Bennett, that she saw Ryan and Erickson get into Ryan's car at approximately 1:30 a.m. and drive away from the area would have been crucial to the defense. Bennett's testimony would have refuted Erickson's testimony about going to Ryan's car, opening the trunk and grabbing the tire tool. She would have provided unique impeachment evidence, because no other witness rebutted Erickson's testimony following the sequence of events after he and Ryan left the bar.

4. The cumulative effect of the undisclosed materials prejudiced Ryan

While each of these pieces of evidence is material in isolation, it is proper for the cumulative effect of all the excluded evidence to be evaluated in determining if a *Brady* violation occurred. *Kyles*, 514 U.S. at 419. Because the undisclosed evidence would have allowed the defense to impeach the prosecution's only evidence against Ryan, and because the Boyd interview further established an alternative suspect to the murder, Ryan was prejudiced by the prosecution's failure to disclose the evidence. Relief must be granted.

CLAIM FOUR

RYAN'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED WHERE, WITHOUT HIS KNOWLEDGE, LINCOLN COUNTY EMPLOYED AN OPT OUT PROCEDURE THAT ALLOWED OTHERWISE QUALIFIED JURORS TO PAY A FEE AND PERFORM COMMUNITY SERVICE IN LIEU OF JURY DUTY. THIS PROCEDURE CONSTITUTES A FUNDAMENTAL AND SYSTEMIC DEPARTURE FROM JURY SELECTION STATUTES, AND RELIEF MUST BE GRANTED.

Though Ryan was tried in Boone County, the parties agreed to draw his jury from Lincoln County as a result of publicity concerns. Ryan and his attorneys – as well as the district public defender – were unaware that at the time Ryan's jury was selected Lincoln County employed an "opt out" program for jury selection. The program allowed otherwise qualified jurors to unilaterally elect community service in lieu of having their names placed on the qualified jury list. The Eastern District Appellate Court has since deemed this practice a "fundamental and systemic" departure from the statutory jury selection requirements. The deprivation of Ryan's right to have a jury selected in compliance with the statutory jury selection requirements entitles him to habeas relief.

A. THE LINCOLN COUNTY OPT OUT PROGRAM VIOLATES MISSOURI JURY SELECTION STATUTES

At the time Ryan's jury was drawn from Lincoln County, and without Ryan or his attorneys' knowledge, Lincoln County employed an "opt out" program for potential jurors. Under the program, otherwise qualified jurors could opt out of jury service by

paying $50 and performing six hours of community service. (Hab. 9).[14] Any person that elected to opt out of jury service was removed from the list of jurors eligible for random selection to a venire panel. (Hab. 9).

The pool selection report in Ryan's case establishes that 848 people were originally on the list of potential jurors. (Hab. 16). Of the 848 people on the list, 363 were listed as ineligible to serve and 221 were excused for hardship. (Hab. 18). Of the 264 people remaining 13 were excused for "community service." (Hab. 19). People became aware of and then took advantage of the "community service" option if they called or wrote the court and asked to be excused. (Hab. 20). The request had to be in writing and, if the person did not qualify for a hardship excuse, the judge would offer them the option of doing community service in exchange for not appearing for jury duty. (Hab. 20). The letter sent by the judge to prospective jurors in which he proposed the community service alternative was different than the "statutory hardship" letter that might be sent to those with health issues. (Hab. 22).[15]

§494.000 provides the basic framework from which service is determined and is based upon state and federal constitutional requirements that jury selection lead to juries drawn from a fair cross-section of the community and that citizens' equal protection rights be protected through that selection process. *Duren v. Missouri*, 439 U.S. 357, 364 (1979). §494.000 RSMo. 2000 provides that:

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[14] Judge Callahan heard evidence regarding the jury selection claim in 2008. The report of proceedings from that hearing shall be designated "Hab. __".

[15] The jury records are attached as (Pet. Exh. 98, 98a).

> All persons qualified for grand or petit jury services shall be citizens of the state and shall be selected at random from a fair cross section of the citizens of the county or of the city not within a county for which the jury may be impaneled, and all such citizens shall have the opportunity to be considered for jury service and an obligation to serve as jurors when summoned for that purpose, unless excused. A citizen of the county or of a city not within a county for which the jury may be impaneled shall not be excluded from selection for possible grand or petit jury service on account of race, color, religion, sex, national origin, or economic status.

While §494.400 disallows exclusion from service based on certain specific factors, §494.425 renders ineligible persons falling into any of eight categories. Those categories are: persons younger than 21; non-United States citizens; non residents of the city or county that issued the jury summons; felons whose civil rights have not been restored; those unable to read, speak and understand English, unless that lack of understanding is due to a vision or hearing impairment that can be compensated with aids; those on active duty in the United States military or state militia; judges, and those who the court believes cannot perform a juror's duties because of mental or physical illness or incapacity.

To similar effect, §494.430 sets forth the parameters under which, upon application to the court, those called for service can be excused. While the court has discretion to excuse those who believe that serving will cause them undue or extreme physical or financial hardship, §494.430 requires that those who seek to be excused for those reasons meet strict guidelines or the excuse will not be granted. After all, "The legislature has seen fit to prescribe the manner of selecting juries. The officers charged with this duty must at least substantially comply with the procedure prescribed. Courts

are not authorized to ignore, emasculate, or set aside the statutory provisions." *State v. Gresham*, 637 S.W.2d 20, 26 (Mo. banc. 1982); *State v. McGoldrick*, 236 S.W.2d 306, 308 (Mo. 1951).

If a grand or petit jury is selected but there has been a "substantial failure to comply" with the provisions set forth in Chapter 494, litigants may obtain relief. §494.465 RSMo. 2000; *State v. Anderson*, 79 S.W.3d 420, 431 (Mo. banc. 2002). The legislature has provided that a court may grant "other appropriate relief." §494.465 RSMo. 2000. Thus, while relief may take the form of staying the proceedings or quashing the indictment, the court also may fashion the relief it grants to remedy the particular harm caused. Where the failure to comply with the statute is substantial because the violation is fundamental or systemic in nature, relief may be granted even absent a showing of actual prejudice or a constitutional violation. *Anderson*, 79 S.W.3d at 432, n.4. Typically, however, a substantial failure to comply is one that rises to the level of a constitutional violation and/or actually prejudices the defendant. *Id.* at 431-32.

The Eastern District Appellate Court has twice addressed the exact opt out program employed in Ryan's case. In *Preston v. State* the defendant, who was tried and convicted in Lincoln County, filed a Rule 29.15 motion challenging the propriety of the opt out program. 325 S.W.3d 420 (Mo. App. E.D. 2010). Like Ryan's case, the defendant in *Preston* alleged that neither his trial nor appellate counsel had knowledge of the practice at the time of his trial and filing of his direct appeal. *Id.* Seven out of the 915 people in the pool of potential jurors avoided potential jury service by electing the community service option. *Id.* The defendant alleged that the opt out program

improperly restricted those persons eligible for random selection to the venire panel in violation of the statutory jury selection scheme. *Id.* The motion court denied the defendant's motion and the defendant appealed.

As a threshold matter, the Appellate Court rejected the State's contention that the defendant's claim was untimely. *Id.* at 423. The court noted the violation occurred without the defendant's actual or constructive knowledge and, in the exercise of reasonable diligence the defendant would not have discovered the practice employed by the court. *Id.* The court held that refusal to consider his claim would thus result in "fundamental unfairness." *Id.* (citing *Hudson v. State*, 248 S.W.3d 56, 58-59 (Mo. App. W.D. 2008)).

The court next determined whether Lincoln County's practice of allowing qualified jurors to opt out of jury service substantially fails to comply with Missouri's jury selection statutes. The court noted that only a "substantial failure" to comply would entitle the defendant to relief in the absence of actual prejudice or a constitutional violation. *Id.* at 425 (citing *Anderson*, 79 S.W.3d at 431).

The court held that the opt out program constitutes a "fundamental and systemic deviation from the declared policy" of the jury selection statutes. *Id.* at 426. The court noted that the opt out program eviscerates two of the stated purposes of the statutory scheme – that qualified jurors have an obligation to serve when summoned unless excused, and excusal is predicated on a discretionary judicial determination. *Id.* The court held that because the program substantially failed to comply with the jury selection statutes the defendant did not have to show prejudice to be entitled to relief. *Id.*

Lincoln County employed the exact same program for selecting the venire panel in Ryan's case as it did in *Preston*. In fact, the program had a larger relative effect in Ryan's case because more individuals from a smaller pool of potential jurors elected the program than in *Preston*.

Since *Preston*, the Appellate Court has had the opportunity to address the opt out procedure in the context of a petition for writ of habeas corpus. *State ex rel. Koster v. McCarver*, 376 S.W.3d 46 (Mo. App. E.D. 2012). The exact same procedure in *Preston* was used in *McCarver*. *Id.* at 49. The petitioner in *McCarver* alleged that the Lincoln County jury selection procedure deprived him of due process of law and a jury drawn from a fair cross-section of the population in violation of the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. *Id.*

As in *Preston*, the *McCarver* court rejected the State's argument that the petitioner had defaulted on his claim, once again holding that the record supported the determination that the factual basis for the claim was not known to the petitioner during the time available for filing for post-conviction relief. *Id.* at 54. The court also rejected the State's contention that *Preston* was wrongly decided. *Id.* The court affirmed the judgment of the lower court granting the writ, holding that the petitioner had established a constitutional violation based on the jury selection procedure. *Id.*

The *Preston* and *McCarver* decisions are directly applicable here. Lincoln County's "fundamental and systemic" departure from the statutory framework denied

Ryan's right to have a jury selected in compliance with statutory requirements and deprived him of due process. Habeas corpus relief must be granted.

B. RYAN'S DUE PROCESS CLAIM IS COGNIZABLE IN THIS PROCEEDING

As stated, *supra*, Ryan sought relief in this Court as to this specific issue. This Court denied the petition without prejudice to Ryan's ability to reassert the issue pending the lower court's disposition of Ryan's other claims. *State ex rel. Ferguson v. Dormire*, WD73705. The lower court "seriously considered" Ryan's jury claim in light of *Preston*, but ultimately concluded that it could not grant relief based on the prior judgments entered by Judge Callahan, this Court and the Missouri Supreme Court. (Pet. Exh. 116, p. 2). In a prior ruling Judge Green indicated that he could not reconsider the issue, even in light of *Preston*, based on Supreme Court Rule 91.22 and §532.040 RSMo 2000.

Judge Green erred. Ryan's claim is cognizable in these proceedings because he has established a "gateway of innocence" that permits this Court to review the jury selection claim, even assuming, *arguendo*, that the claim is otherwise procedurally barred.

The presentation of new evidence establishing actual innocence enables this Court to consider a claim otherwise procedurally barred. *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc. 2000). "[A] person cannot usually utilize a writ of habeas corpus to raise procedurally-barred claims – those that could have been raised, but were not raised, on direct appeal or in a post-conviction proceeding." *Id.* citing *Simmons v. White*, 866 S.W.2d 443, 445-46 (Mo.banc. 1993). Limited exceptions to this rule apply "in

circumstances so rare and exceptional that a manifest injustice results" if habeas corpus relief is not granted. *Id.* (citing *Simmons*, 866 S.W.3d at 445-46). A manifest injustice requires a petitioner to show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id* (citing *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). The requisite probability requires a showing that no reasonable juror would have convicted the petitioner in light of the new evidence of innocence. *Id.* As explained in *Schlup*, a showing of actual innocence acts as "a gateway through which a habeas petitioner must pass to have his claim considered on the merits." *Id.* at 315-16.

In evaluating a "gateway" innocence claim, a court must consider all of the evidence and make a "probabilistic determination about what reasonable, properly instructed jurors would do." *Schlup*, 513 U.S. at 329. Though the standard is demanding, it does not require "absolute certainty" about a petitioner's guilt or innocence. *House v. Bell*, 547 U.S. 518, 538 (2006). The inquiry requires the court to assess how reasonable jurors would view the new evidence. *Id.*

In the instant case, as detailed, *supra*, Ryan has presented powerful new evidence of actual innocence. The evidence at trial was very weak, and the physical evidence actually excluded Ryan. Now, the only two witnesses to implicate Ryan in the murder at trial have admitted that they committed perjury. Without the identification of Trump and the trial testimony of Erickson, no evidence remains to support the conviction.

Furthermore, no reasonable juror would enter a judgment of conviction based on the current record. Jerry Trump - a convicted sex offender - could not give a detailed description of who he saw by Heitholt's car the night of the murder. Charles Erickson's

trial testimony was exhaustively impeached, fraught with inconsistencies and contradicted the physical evidence. Thus, these two witnesses' admissions of perjury completely destroys the credibility of the State's case. Ryan has thus established the "gateway" that permits review of this issue.

Judge Callahan, in addressing the Attorney General's prior argument that Ryan waived the jury selection claim by failing to object at trial or raise the issue on direct appeal, specifically noted that Ryan (at that time) "[did] not suggest that he has any new evidence of actual innocence." (Pet. Exh. 118, pp. 2-3). Thus, Judge Callahan held that Ryan needed to show "cause" to overcome his default. Judge Callahan held that Ryan had not shown cause to overcome his default because his attorneys could have asked the circuit clerk for the information pertaining to the opt out procedure prior to trial. (Pet. Exh. 118, pp. 2-3.)

Thus, the precise claim for relief here - that Ryan's showing of actual innocence relaxes the procedural bar and permits this Court to grant relief on the jury selection issue - has not been decided by any higher court. Therefore, Judge Green's determination that Rule 91.22 precludes consideration of this issue is erroneous. The prior petition did not assert a claim of actual innocence based on new evidence, nor did it assert a gateway claim of innocence such that the court could consider the jury selection claim.

C. FAILURE TO CONSIDER THIS CLAIM WOULD RESULT IN A MANIFEST INJUSTICE

Refusal to consider Ryan's jury selection claim in light of *Preston* and *McCarver* would result in a manifest injustice. Judge Callahan's ruling - made without the benefit

of any higher court decision - directly contradicts both *Preston* and *McCarver* in every respect. Neither defendant in *Preston* nor *McCarver* asserted new evidence of actual innocence. Yet both were granted relief based upon a denial of their right to due process.

First, the State in *Preston* argued – as it did in opposition to Ryan's previous habeas petition – that the defendant's claim was untimely. Specifically, the State argued that pursuant to §494.465 motions asserting non-conformity with Missouri's jury selection statutes must be made "before the petit jury is sworn to try the case or within fourteen days after the moving party discovers or by the exercise of reasonable diligence could have discovered the grounds therefor, whichever occurs later." According to the State, as a result Ryan defaulted the jury selection claim.

The *Preston* Court explicitly rejected the State's timeliness argument. In doing so, the court noted the alleged violation occurred outside the defendant's presence, i.e., when the county board of jury commissioners assembled the qualified jury lists for the term in which the defendant's jury was constituted. The record revealed no evidence that the defendant's trial or appellate attorneys had knowledge of, or through the exercise of reasonable diligence would have discovered, the practice employed by the circuit court. The court therefore held that refusal to consider the defendant's claim would result in "fundamental unfairness." *Preston*, 325 S.W.3d at 423.

The previous judgment, entered without the benefit of the *Preston* decision, directly contradicts *Preston*. Specifically, Judge Callahan held that Ryan's claim was barred because Ryan "could have discovered the facts underlying his claim well before trial." However, as recognized by the appellate court in *Preston*, reasonable diligence

would not have resulted in discovery of the claim because Ryan had no reason to believe that the jury list was improperly assembled. The *Preston* Court noted that the error occurred outside the defendant's presence, and thus refused to charge the defendant with the responsibility to ferret out a deviation from the jury selection statutes where the defendant had no reason to suspect a deviation in the first place.

Second, the State argued in *Preston* – as it argued in opposition to Ryan's previous habeas petition – that Lincoln County's "opt out" program did not constitute a "substantial failure" to comply with the statutory jury selection requirements. The *Preston* Court held otherwise:

> "Though the community service opt-out practice . . . does not directly impinge on the concept of *random* juror selection . . . Lincoln County's practice implicates two other principles fundamental to the declared policy of the jury selection statutes. First, all qualified citizens have "an *obligation* to serve as jurors when summoned for that purposes, unless excused." §494.400. Second, excusal from jury service is generally predicated on a *discretionary judicial determination*. §494.430.1(2), (3). Permitting an otherwise qualified Missouri citizen to thwart these two principles by intentionally and unilaterally choosing to remove their name from a county's qualified jury list and forgo any potential jury obligations constitutes a statutory violation, one that is fundamental and systemic in nature."

Id. at 426. The *Preston* Court concluded that because the deviation was "fundamental and systemic" the defendant need not demonstrate prejudice in order to obtain relief. *Id.*

The previous judgment again directly contradicts the *Preston* decision. Specifically, Judge Callahan held that despite the opt-out program jury selection was still "random." Judge Callahan also determined that only 1.4% of the qualified jury pool was

affected. Because the selection was "random" and only 1.4% of the pool was affected, Judge Callahan held the practice is not a "substantial failure" to comply with the statute.

However, the *Preston* Court noted there are requirements other than the "randomness" of the jury selection with which the jury selection statutes require compliance. First, Lincoln County jury selection procedures fail to promote each qualified citizen's obligation to serve as jurors unless excused. Second, excusal is predicated on a discretionary *judicial* determination. Permitting otherwise qualified jurors to unilaterally remove themselves from the jury list defeats these purposes and constitutes a "fundamental and systematic" departure from statutory requirements. Further, consistent with *Preston*, the percentage of the jury pool has no bearing on compliance. *Id.*

Ryan has a constitutional right to have a jury selected consistent with due process and in compliance with the statutory scheme. To refuse to consider this claim, particularly in light of the *Preston* and *McCarver* decisions, would result in "fundamental unfairness."

V.

STATEMENT OF JUDGE GREEN'S ERRONEOUS APPLICATION OF FACT AND LAW

A. STANDARD OF REVIEW

In an order distinguished only by its numerous factual and legal errors, Judge Green denied Ryan habeas relief. (Pet. Exh. 116). Where a petition for writ of habeas corpus is denied, the petitioner's remedy is to file a new writ petition in a higher court.

Buchanan v. State, 216 S.W.3d 238, 239 n.1 (Mo. App. E.D. 2007). Therefore, this is an original petition seeking habeas corpus relief.

To the extent this Court considers Judge Green's ruling in this original action, his findings and conclusions are likely afforded the "weight and deference which would be given to a court-tried case by a reviewing court." *State ex rel. Woodworth v. Denney*, SC91021, at 9 (Mo. banc Jan. 8, 2013) (applying this standard of review to findings and conclusions made by special master); *accord State ex rel. Winfield v. Roper,* 292 S.W.3d 909, 910 (Mo. 2009); *State ex re. Lyons v. Lombardi*, 303 S.W.3d 523 (Mo. banc 2010). As *Lyons* recently noted, in such cases, the judge's findings and conclusions cannot be sustained if there is no substantial evidence to support them, they are against the weight of the evidence, or they erroneously declare or apply the law. *Lyons*, 303 S.W.3d at 525-526.

B. JUDGE GREEN ERRONEOUSLY DECLARED AND APPLIED THE LAW

In his Findings of Fact, Conclusions of Law and Judgment, Judge Green set forth a section entitled "Burden of Proof and Relevant Case Law." Many of his statements of law are erroneous. It is also apparent that Judge Green made a number of errors in the application of the proper law. Ryan hereby provides the Court with a non-exhaustive list of examples:

1. Judge Green's holding that Trump's recantation was "not material" is contrary to well-established Missouri law

Judge Green correctly determined that Trump committed perjury at Ryan's trial by making a false in-court identification, but stated that his perjured testimony was "not

material and merely cumulative." (Pet. Exh. 116, pp. 31-32, 40). As explained *supra*, Erickson's trial testimony was extensively impeached and undermined. In 2006 the Attorney General admitted that "the jury might have reasonably believed that Erickson had experienced what is commonly known as an alcohol-induced 'blackout,' and that Erickson simply did not recall his actions." (Pet. Exh. 120, p. 62) (emphasis added). Trump's trial identification was the only purportedly credible evidence that corroborated Erickson's impeached and implausible story, and was the only evidence that connected Ryan to the crime. Judge Green's claim that Prosecutor Crane "downplayed" Trump's identification at trial is erroneous. (Pet. Exh. 116, p. 30). Prosecutor Crane emphasized the significance of Trump's identification, stating, "Jerry Trump, in front of you all, in court, said, 'I saw those photos, and they were the ones.' And in court, he pointed [Ryan] out." (TT 2122). Thus, Trump's in-court identification of Ryan was not only material to Ryan's conviction, it was critical. Judge Green's holding that Trump's identification was perjured testimony, but immaterial, is contrary to the law.

First, Judge Green's finding is legally impossible, as a person cannot commit perjury by falsely testifying as to an immaterial matter. *Harris v. Quincy, O. & K.C.R. Co.*, 157 S.W. 893 (Mo. App Kan. City 1913) ("False testimony as to an immaterial matter is not perjury."); §575.040.2 RSMo. 2000.

Second, false testimony is material if it could have substantially affected the course or outcome of the cause, matter or proceeding, regardless of whether the testimony actually deceived the trier of fact. §575.040.2 RSMo. 2000; *State v. Jarrett*, 304 S.W.3d 151, 156 (Mo. App. S.D. 2009); *see also State v. Albanese,* 9 S.W.3d 39, 50

(Mo. App. W.D. 1999) (applying §575.040.2 RSMo. 2000 to habeas case); *State v. Brinkley*, 189 S.W.2d 314, 321 (Mo. 1945) (evidence of perjury is sufficient for conviction if the testimony is collaterally, corroboratively, or circumstantially material). In *State v. Fletcher*, an accomplice's false testimony in a burglary case that she had told the defendant that they were moving furniture out of a house, rather than burglarizing it, was material because if believed, the testimony would negate *mens rea*. 948 S.W.2d 436, 437 (Mo. App. W.D. 1997). It was not enough, the court explained, that the false testimony was implausible and ultimately ineffective. *Id.* Here, Trump's testimony was more material, as it not only placed Ryan at the murder scene, but it also was apparently perceived as plausible and effective by the fact-finder, ultimately leading to his conviction. *See also State v. Martin*, 295 S.W. 543 (Mo. 1927) (statement material where both sides treated it as material and evidence was presented supporting and opposing its validity).

Third, Trump's recantation is clearly material under *Brady*. Courts deciding *Brady* claims assess, like they do under *Amrine*, whether the evidence would substantially undermine the jury's verdict. *State v. Parker*, 198 S.W.3d 178, 180, 192 (Mo. App. W.D. 2006); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). More specifically, evidence is material under *Brady* if there is a reasonable probability that it would have caused a different result in the proceeding. *Engel v. Dormire*, 304 S.W.3d 120 (Mo. banc. 2010). Materiality "is not a sufficiency of the evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence . . . there would not have been enough to convict." *Kyles*, 514 U.S. at 434-35.

In *Kyles*, four eyewitnesses who were at the murder scene took the stand and identified the defendant as the victim's killer. *Id.* at 441. Two of those witnesses testified that they actually saw the defendant kill the victim. The Court held that prior inconsistent statements made by these two witnesses severely undermined their in-court identifications and discredited certain pieces of physical evidence. *Id.* at 444, 452-453. The Court noted, however, that the now discredited physical evidence "[did] not, to be sure, prove [the defendant's] innocence, and the jury might have found the eyewitness testimony of [the two other witnesses] sufficient to convict." *Id.* at 453. Even so, the Court held that it could not "be confident that the jury's verdict would have been the same," noting that the inconsistent statements would have allowed the jury to find that the eyewitnesses were inconsistent in their descriptions, that two of the four witnesses were unreliable, that the most damning physical evidence was subject to suspicion, and that the investigation was insufficient. *Id.* at 453-54.

As in *Kyles*, Trump's testimony accounted for 50% of the eyewitness testimony in the case, and Prosecutor Crane relied on Trump's identification in his closing arguments. But unlike in *Kyles*, (1) there was no physical evidence linking Ryan to the crime, (2) the only testimony other than Trump's linking Ryan to the crime was Erickson's implausible, inconsistent, impeached, and now recanted trial testimony, (3) the case came down to Ryan's word against Erickson's, and Trump's testimony was the only testimony that significantly corroborated Erickson's testimony and discredited Ryan's, and (4) Trump's testimony was not just unreliable, it was false. Thus, Trump's testimony in this case was even more material than the inconsistent statements in *Kyles* and his credible recantation

negates any confidence one could have in Ryan's conviction. *See also Smith v. Cain*, 132 S. Ct. 627, 630 (2012) (where witness's testimony was the only evidence linking the defendant to the crime, contradictory statements made by the witness material even if the contradictions could have been explained away or discounted at trial); *Parker*, 198 S.W.3d at 191-92 (State's "*only witness* to give a positive identification" of the defendant clearly critical to the State's case, making evidence that "would have cast doubt" on all his testimony material); *Engel*, 304 S.W.3d 120 (evidence that would have significantly undermined the credibility of a key witness, the suppression of which bolstered the credibility of that witness, deemed material and prejudicial).

In the end, Trump's testimony was imperative to Ryan's conviction because it was the sole evidence corroborating Erickson's fantastic (and now recanted) testimony and placing Ryan at the murder scene. Under any standard of Missouri law, and contrary to Judge Green's belief, Trump's testimony was undeniably material.

2. Judge Green's reliance on *Case v. Hatch* was misplaced

Judge Green's reliance on *Case v. Hatch*, 183 P.3d 905 (N.M. 2008), was without legal basis. *Case* is a New Mexico case Judge Green found non-binding but "perceptive" in how it assessed recantation credibility. (Pet. Exh. 116, p. 7). Judge Green adopted and applied the *Case* court's holding that a court must be "left with a firm belief that but for the perjured testimony the defendant would most likely not have been convicted." (*Id.* at 32); *Case*, 183 P.3d at 911. Significantly, Judge Green applied this standard to Ryan's freestanding actual innocence claim, even though the petitioner in *Case* was "not making a freestanding claim of actual innocence." *Case*, 183 P.3d at 910. Further, no Missouri

court has adopted or applied this "firm belief" language as the relevant standard. The *Case* court itself recognized that the "firm belief" standard is the minority position and that most courts apply a "probably" or "likely" standard. *Case,* 183 P.3d at 911; *see also Ferguson*, 325 S.W.3d at 409 (habeas relief available to petitioner who shows that constitutional violation "probably resulted in the conviction of one who is actually innocent."); *Albanese*, 9 S.W.3d at 51 (assessing prejudicial impact of perjured testimony in terms of *Brady* and Missouri perjury statute). And finally, the *Case* court was harshly criticized by a U.S. District Court for its "troubling lack of depth and deficit in understanding regarding the [relevant] law." *Case v. Hatch*, 773 F. Supp. 2d 1070, 1131 (D.N.M. 2011). No other Missouri court has cited *Case* as perceptive, instructive, or for any other reason. Judge Green adopted a standard that does not reflect Missouri law and has been harshly criticized as deficient in its legal analysis.

3. Judge Green relied on additional irrelevant cases regarding recantations

Judge Green stated that "the law views recantations with suspicion," and relied on cases reflecting this contention in his findings regarding the recantations of Trump and Erickson. (Pet. Exh. 116, p. 6, 27 (citing *State v. Cook*, 339 S.W.3d 523 (Mo. App. E.D. 2011); *State v. Harris*, 428 S.W.2d 497, 501 (Mo. banc. 1968); *Haouari v. United States*, 510 F.3d 350, 353 (2d Cir. 2007); *State v. Garner*, 976 S.W.2d 57, 60 (Mo. App. W.D. 1998))). The cases cited by Judge Green have no applicability in this case, and Judge Green's reliance on them is misplaced. Inexplicably, Judge Green never mentioned the

fact that Trump and Erickson voluntarily subjected themselves to perjury charges by recanting.

In *Harris*, a case also relied on by Respondent in the prior proceedings, the defendant filed a motion for writ of error *coram nobis* claiming that he was convicted based on perjured testimony. *Harris*, 428 S.W.2d at 498. The motion alleged that affidavits from two of the prosecution's witnesses demonstrated that their testimony against the defendant was false and perjured. *Id.* at 499. At a hearing on the motion, one of the witnesses did not even testify. *Id.* The other witness exercised her constitutional right to not testify when asked whether she had lied at trial. *Id.* Thus, neither witness offered any testimony at the hearing recanting his or her trial testimony. *Id.* The failure of the witnesses to admit their perjury on the stand was the basis of the Missouri Supreme Court's decision to deny relief: "There is no reason for us to accept what the affidavits say in preference to what affiants said when they testified at defendant's trial. Their testimony at the trial was subjected to the test of cross examination. What affiants said in their affidavits was not thus tested." *Id.* at 501. Likewise, the *Haouari* court refused to grant a new trial because the recantation was in the form of a general, unsworn letter - rather than in-court testimony - that was not subject to cross examination or the laws of perjury. *Haouari*, 510 F.3d at 353-541.

Harris and *Haouari* thus recognized the key distinction between mere affidavits and an actual admission of perjury in sworn testimony: "The court must be reasonably satisfied of the truth of the *recanting testimony*. In this case *there was no recanting testimony*, and the trial court was not obliged to and evidently did not accept the

affidavits at face value." *Harris*, 428 S.W.2d at 501 (emphasis added); *see also Newman v. United States*, 238 F.2d at 862 (court did not have to accept vague recantation affidavit that lacked "a present vouchsafing for its current truth").

Unlike the witnesses in *Harris* and *Haouari,* Trump and Erickson have also testified under oath, subject to cross examination. Their testimony at the hearing exposes them both to Class A felony perjury charges, a fact both acknowledged on the stand. (HH Trump 234; HH Erickson 335). In the face of a possible perjury charge and a sentence of ten to thirty years or life imprisonment, Trump and Erickson have a strong disincentive to admit that they lied at Ryan's trial. Indeed, courts have found that one important factor in determining the credibility of a recantation is whether the recanting witness "admitted his perjury on the witness stand and thereby subjected himself to prosecution therefor." *State v. Fuentes*, 67 N.M. 31 (1960); *Hubbard v. State*, 912 So.2d 629 (Fla. Dist. Ct. App. 2005).

In *State v. York*, 41 Wash. App. 538 (1985) the court was faced with a factual scenario analogous to that presented here. There, the court determined that the record supported the finding that the defendant's conviction rested solely upon recanted testimony and that no corroborative evidence existed to support the conviction. Based upon that, the court explained:

> The jury at the trial did not have the fact before it that the witness had made sworn statements contrary to her testimony. The witness made sworn statements afterwards. It is rare that any person will testify to a truth and subsequently testify that such testimony was false. The evidence of such witnesses, uncorroborated in essential facts, ought to be received with caution, to say the least, and a man not to be sent to the penitentiary *until a jury has had an opportunity*

> *to pass upon it,* which has not been done here. No injustice can be done upon a new trial. New trials have frequently been granted upon the showing made in this case.

State v. York, 41 Wash.App. 538, 546 (1985) (emphasis in original). In the case at bar, following the logic of the *York* decision, it is clear that recantations should be evaluated by a new jury. As in *York*, no injustice can be done by granting a new trial. None of the evidence at trial corroborated the stories told by Trump and Erickson. Their testimony at the habeas hearing makes them vulnerable to perjury charges and life sentences. As such, their recantations have an inherent credibility not present in the *Harris* or *Haouari* cases.

Amrine is consistent with *Harris* and *Haouari*. In *Amrine* the recanting witnesses testified that they lied when they implicated *Amrine* in the murder at trial. *Amrine* effectively holds that an admission of perjury, under oath and subject to cross examination, is sufficient to undermine a court's confidence in a judgment where the recanting witness provided the *only* evidence at trial supporting the conviction. "[W]here it appears from competent and satisfactory evidence that a witness for the prosecution has deliberately perjured himself and that without his testimony [the] accused would not have been convicted, a new trial will be granted." *Harris*, 428 S.W.2d at 500 (citing 24 C.J.S. Criminal Law 1454, pp. 188-189).

The remaining cases cited by Judge Green are distinguishable for additional reasons. In *State v. Cook*, the court refused to grant a new trial where a child sex-abuse victim's recantation was clearly the result of months of substantial coercion by her mother and her father (the convicted abuser), and there was direct evidence that the mother and father were involved in the writing of the recantation. 339 S.W.3d at 532.

Cook therefore clearly has no bearing on this murder case where two adult witnesses, without any evidence of undue influence, admit that they falsely implicated Ryan.

In *State v. Garner*, a car-jacking case, a witness testified at trial that the defendant put a sawed-off shotgun in his face and stole his car. 976 S.W.2d at 58. The police later saw the defendant in the stolen car and pursued him. *Id.* Rather than pulling over, the defendant led the police on a high-speed chase. *Id.* The defendant ultimately crashed the car and then tried to elude the police by foot. *Id.* When he was finally apprehended, three shotgun shells were found in his pocket. *Id.* at 58-59. At sentencing, the defendant offered the testimony of an acquaintance he spoke with while in jail. *Id.* at 59. This new witness testified that he had heard the victim negotiating a payment plan to sell his car to the defendant, and then all of a sudden the defendant got in the car and they all drove their separate ways. *Id.* at 60. The court denied a new trial based on this witness's testimony.

Garner has no application to this case. First, unlike Trump and Erickson, the witness did not testify at the trial, and therefore did not provide false testimony leading to the defendant's conviction and subsequently recant that testimony. Second, the case in *Garner* was not based entirely on witness testimony. Instead, as the *Garner* court noted, "[the defendant] was found with three shotgun shells in his pocket when he was apprehended after attempting to elude the police." *Id.* No such evidence exists here. Third, unlike with Erickson and Trump, the witness's sentencing hearing testimony did not subject him to perjury charges.

Finally, Judge Green noted that "A witness who was involved in the crime may come forward to recant for a variety of base motives or importunities," citing *Newman v. United States*, 238 F.2d 861, 862 (5th Cir. 1956). (Pet. Exh. 116, p. 7). The only example provided by the *Newman* court was the difficulty in prosecuting individuals for perjury. There has been no showing that it would be difficult to charge Erickson or Trump with perjury in this case. Additionally, as explained below, Judge Green's purported reasons for Erickson's recantation are without factual support or are directly contrary to the evidence.

Following *Amrine*, confidence in the verdict is fatally undermined by the fact that all of the evidence supporting the conviction has been discredited. Unlike in the cases cited by Judge Green, where the witnesses did not testify or testified under coercion, and/or the evidence of guilt was overwhelming, the admissions of perjury by Trump and Erickson are sufficient to undermine confidence in the correctness of Ryan's conviction. At the habeas hearing Respondent failed to demonstrate why Trump and Erickson would put themselves at such peril by admitting they perjured themselves at Ryan's trial. Both witnesses have acknowledged that their testimony in these proceedings was freely given and subjects them to a possible perjury charge. Erickson has further admitted that he violated his plea agreement by failing to testify truthfully at Ryan's trial, which subjects him to resentencing on the murder conviction.

Because the only evidence tying Ryan to the murder has been completely discredited and there is no evidence remaining against Ryan, the Petition for Writ of Habeas Corpus should have been granted.

4. Judge Green ignored important *Brady* principles

Judge Green ignored two principles of law essential to deciding *Brady* claims. First, when assessing prejudice for purposes of *Brady* and for purposes of the cause and prejudice gateway, a habeas court must "consider[] all available evidence uncovered following the trial." *State ex rel. Griffin v. Denney,* 347 S.W.3d 73, 77 (Mo. banc 2011) (emphasis added); *accord State ex rel. Woodworth v. Denney*, No. SC 9102, at 13 (Mo. banc Jan. 8, 2013). Judge Green never cited this highly relevant rule of law, and his analysis indicates that he did not follow it. (Pet. Exh. 116, p. 33-39) (assessing prejudicial value of withheld evidence in isolation rather than in combination with all evidence, and ignoring habeas hearing testimony of Dr. Blum, Mr. Buckley, and other witnesses).

Second, the U.S. Supreme Court has expressly held that courts must consider the cumulative effect of excluded evidence in determining if a *Brady* violation occurred. *Kyles*, 514 U.S. at 437, 453-54 (1995). "Thus, for materiality purposes, courts are obligated to consider the State's non-disclosures collectively, not item by item. Accordingly, where a number of relatively minor omissions have a cumulative effect, lesser instances of non-disclosure may result in a *Brady* violation." *Parker*, 198 S.W.3d at 187 (Mo. App. W.D. 2006). Judge Green breached this clear rule of law by assessing the materiality of the withheld evidence in this case in isolation. (Pet. Exh. 116, p. 33-39); *Kyles,* 514 U.S. at 441 (5th Circuit's review of *Brady* evidence was improperly done as "a series of independent materiality evaluations, rather than the cumulative evaluation required by *Bagley*").

5. Judge Green ignored *Amrine*'s requirement that courts review all the available evidence in assessing claims of actual innocence

When reviewing a freestanding claim of actual innocence, "the evidence supporting the conviction must be assessed in light of all the evidence now available." *Id.* (emphasis added). Judge Green did not acknowledge *Amrine's* all-the-evidence mandate, and seemed to instead determine that he only needed to consider evidence that could not have been presented at trial. (Pet. Exh. 116, p. 4).

6. Judge Green ignored precedent establishing that "new evidence" under *Schlup v. Delo* is that which was not presented at trial

With respect to Ryan's "actual innocence" gateway claim, Judge Green stated, "Under *Schlup*, in order for evidence to be classified as new, it must be evidence 'that was not available at trial.'" *Story v. Roper,* 603 F.3d 507, 524 (8th Cir. 2010)." (Jg. Green Ruling, at 4). Nowhere in *Schlup* are the words "not available at trial." *Schlup v. Delo*, 513 U.S. 298 (1995). Instead, *Schlup* states that new evidence is that which was "not presented at trial." *Id.* at 324; *see also Griffin v. Johnson*, 350 F.3d 956, 963 (9th Cir. 2003) (evidence new if not presented at trial); *Gomez v. Jaimet*, 350 F.3d 673, 679-681 (7th Cir. 2003) (same). Moreover, "Justice requires that this Court consider all available evidence uncovered following [the petitioner's] trial that may impact his entitlement to habeas relief." *Engel*, 304 S.W.3d at 126. Thus, when assessing either a gateway innocence or free standing actual innocence claim, "once reliable 'new evidence' of innocence is established, then ***all*** evidence now available, old or new, admitted or not, must be assessed by the habeas court." *McElwain*, 340 S.W.3d at 238 n.18.

7. Judge Green relied on inapplicable case law regarding the evidence in this case

Judge Green stated that "[i]f a habeas petitioner adduces conflicting evidence about the murder, the new conflicting evidence is insufficient to show probable innocence." (Pet. Exh. 116, p. 4). To the extent this is a statement of law, it is irrelevant, considering the new evidence in this case eviscerates, rather than contradicts, the evidence presented at trial. This case therefore stands in stark contrast to those cited by Judge Green, none of which are from a Missouri court, and all of which dealt with evidence that was far less significant to the petitioner's conviction than what is presented here. *Moore-El v. Lubbers*, 446 F.3d 890, 902-903 (8th Cir. 2006) (testimony of an additional witness that would have merely contradicted the testimony of the trial witnesses not enough to establish actual innocence gateway); *Johnson v. Norris,* 170 F.3d 816, 818-819 (8th Cir. 1999) (contradictory testimony of witness not presented at trial not enough to establish actual innocence gateway where the "inconsistencies" could easily be reconciled); *Gomez*, 350 F.3d at 679-81 (while some of the testimony was exculpatory, other aspects were inculpatory and even the exculpatory parts could be explained away); *Bosley v. Cain*, 409 F.3d 657, 665 (5th Cir. 2005) (where testimony merely contradicted other testimony, and none of the individuals testifying were credible, actual innocence gateway not met). Unlike in these cases, Ryan's *trial* was the "swearing match," i.e., Ryan and Erickson provided contradictory testimony with Trump's identification tipping the scales in favor of Erickson's version, and Ryan has now presented evidence that there is *no longer a conflict* between the witnesses—Trump admits he did not see Ryan at the

murder scene, and Erickson agrees that his trial testimony that he remembered committing the murder with Ryan was false. The cases cited by Judge Green as "relevant case law" are therefore irrelevant.

8. Judge Green erroneously applied a sufficiency of the evidence standard to Ryan's freestanding actual innocence claim

The Midwest Innocence Project filed an amicus brief in this case explaining the appropriate standard to be applied in Ryan's actual innocence claim. Brief of Amicus Curiae The Midwest Innocence Project, *Ferguson v. Dormire*, No. 11AC-CC00068 (Cole Cty. Cir. Ct. Oct. 31, 2012). As explained by the Midwest Innocence Project, in *Jackson v. Virginia*, 443 U.S. 307 (1979) the Court established the standard of review for claims of insufficient evidence. "The Jackson standard, which focuses on whether any rational juror could have convicted, looks to whether there is sufficient evidence which, if credited, could support the conviction." *Schlup v. Delo*, 513 U.S. 298, 330 (1995). This is the standard Judge Green applied. According to Judge Green, if Trump had testified truthfully, he would have testified that he saw two teenaged white males at the scene "and nothing more."[16] (Pet. Exh. 116, p. 31). After comparing Erickson's trial testimony (by way of watching an unofficial recording of it) with Trump's false identification of Ryan, Judge Green held that "[t]he Court is in no way left with a firm belief that but for the perjured testimony the defendant would most likely not have been convicted. Trump's perjured testimony at the jury trial was not a difference-maker." (Pet. Exh. 116, p. 32).

[16] In fact, if Trump would have testified truthfully, his testimony would have directly contradicted Erickson's testimony on many key points, thereby further undermining Erickson's testimony and Ryan's conviction. *See infra.*. Therefore, even if Judge Green's standard were the proper one, his ultimate conclusion is erroneous.

Judge Green's backward-looking but for standard is not the proper analysis. First, the standard was lifted from *Case v. Hatch*, which, as explained above, is not a free-standing actual innocence case, does not reflect Missouri law, and has been harshly criticized by other courts. Second, The Missouri Supreme Court rejected such a backward-looking sufficiency-of-the-evidence approach as too restrictive for habeas petitioners presenting free-standing claims of innocence because "[i]f habeas relief were conditioned on a finding that no rational juror could convict the petitioner after introduction of the new evidence, it would be impossible to obtain relief because exculpatory evidence cannot outweigh inculpatory evidence under that standard." *Amrine,* 102 S.W.3d at 548. Rather, it is "firmly established in our legal system[ ] that the line between innocence and guilt is drawn with reference to a reasonable doubt." *Schlup,* 513 U.S. at 328, *quoting In re Winship,* 397 U.S. 358 (1970). The burden to prove guilt beyond a reasonable doubt is a reflection on the high value that American jurisprudence places on individual liberty:

> The standard of proof beyond a reasonable doubt ... "plays a vital role in the American scheme of criminal procedure," because it operates to give "concrete substance" to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding. . . . At the same time, by impressing upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused, the standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself.

Jackson v. Virginia, 443 U.S. 307, 315 (1979) (quoting *In re Winship*, 397 U.S. 358, 363, 372 (1970) (Harlan, J., concurring)). Therefore, any test for determining actual innocence "must incorporate the understanding that proof beyond a reasonable doubt

marks the legal boundary between guilt and innocence." *Schlup*, 513 U.S. at 328. This is not to say that a prisoner in Ryan's situation can win release by presenting evidence that a reasonable doubt exists. The actual innocence standard "does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty." *Id.* at 329. This determination "requires a holistic judgment about 'all the evidence,' and its likely effect on reasonable jurors applying the reasonable-doubt standard." *House*, 547 U.S. at 539 (quoting *Schlup*, 513 U.S. at 328).

Thus, in determining whether Ryan is entitled to habeas corpus relief, the evidence must be viewed from the point of view of what a reasonable jury would do, not what a reasonable juror could have done, with the evidence in the event of a retrial. As explained by the Midwest Innocence Project's amicus brief, this is the standard applied in *Amrine,* and it is consistent with long-standing Missouri precedent:

> [F]or more than a century, newly discovered evidence has been measured by the likely effect that it would have on the jury that will hear the case if a new trial were granted. For example, in *State v. Speritus*, the Missouri Supreme Court granted a new trial based on new evidence consisting of out-of-court recantations of the state's key witness. The Missouri Supreme Court assessed the impact of the new evidence based on how it expected the evidence to unfold at a new trial, stating, "[t]hat the newly-discovered evidence would produce a different result in the event a new trial were granted we think possible, if not highly probable." *State v. Speritus*, 90 S.W. 459, 465 (Mo. 1905) (emphasis added). Thus, Missouri courts have long taken the forward-looking view of what impact the new evidence would have on a jury in the event of a retrial.

Brief of Midwest Innocence Project at 8-9. Here, the evidence is clear and convincing that 12 reasonable jurors would not be free of reasonable doubt. *See id.* at 7. Or, as

stated by the *Amrine* Court, the clear and convincing evidence "undermines confidence in the correctness of the judgment." As a result, Ryan's petition should be granted.

B. MANY OF JUDGE GREEN'S FACTUAL FINDINGS EITHER LACK SUBSTANTIAL EVIDENTIARY SUPPORT OR ARE AGAINST THE WEIGHT OF THE EVIDENCE

In his Findings of Fact, Conclusions of Law and Judgment, Judge Green made a number of erroneous factual findings. Many of these findings are either not supported by the evidence or are against the weight of the evidence. Ryan hereby provides the court with a non-exhaustive list of examples:

1. Judge Green's ruling that Erickson's recantation is not credible ignores the record and is not supported by the evidence

In an unprecedented ruling, Judge Green acknowledged that he assessed the credibility of Erickson's recantation by watching an unofficial video recording of Erickson's trial testimony.[17] Of course, Judge Green's finding that Erickson testified credibly at trial is in conflict with this Court's observation and the Attorney General's previous admissions in its 29.15 brief about Erickson's credibility deficits. Moreover, Judge Green relied on several misstatements of fact advanced by the Attorney General in its habeas filings in reaching the ultimate conclusion that Erickson's recantation was not credible.

Judge Green's ruling should not be afforded deference because it was improper for him to assess Erickson's credibility at the habeas hearing by first watching an unofficial video of Erickson's trial testimony. Moreover, his ultimate ruling belies the evidence in

[17] Petitioner could find no case in the United States wherein a court relied upon video footage from a television program to determine the credibility of a key witness in a murder trial.

the record; the "facts" he believes demonstrate the truthfulness of Erickson's trial testimony do not exist and/or are not supported by the evidence. Judge Green completely ignored the overwhelming evidence corroborating Erickson's recantation, and his ruling is fatally flawed in its rendition of the facts and its application of the law.

i. Judge Green improperly assessed Erickson's credibility by watching videotapes of the television program 48 Hours, an unofficial video recording of Erickson's trial testimony

In his ruling Judge Green made it clear that he assessed the credibility of Erickson and Trump's recantation by watching videotapes made by the television program 48 Hours, an unofficial videotape of Erickson and Trump's trial testimony, and comparing the two:

> The trial itself was recorded in the media, and the Court is fortunate to be able to compare the witnesses' (Mr. Trump and Mr. Erickson's) demeanor at trial and at the hearing. This Court finds that Mr. Erickson was testifying truthfully at the jury trial, but is completely fabricating his current stories.

(Pet. Exh. 116, p. 20).

Judge Green's reliance on the video of Erickson's trial testimony is extremely troubling for a number of reasons, not the least of which is that the 48 Hours video is not an official court record. It was made for the purpose of entertaining a television audience and not for the somber and serious task of making a judicial finding about witness credibility in a murder trial. Larry Warner, a cameraman for the CBS television show 48 Hours, oversaw portions of the filming of the Ferguson trial. (Pet. Exh. 117, para. 2). According to Warner, CBS's purpose in filming the trial was not to create an official

court record, but rather to use excerpts for a 48 Hours feature on Ryan's case.[18] (Pet. Exh. 117, para. 3). The footage taken at the trial was taken from one camera, and the video was not shot continuously. (Pet. Exh. 117, para. 4). As a result, parts of the proceedings were not recorded. (Pet. Exh. 117, para. 4). Obviously, the recording has never been certified as an accurate court record.

Likewise, Shelley Plate, a licensed certified shorthand reporter, has reviewed the DVDs reviewed by Judge Green. (Pet. Exh. 125, para. 5). Plate is the founder of Shelley Plate Reporting, Inc., which provides various court reporting services including legal videography and digital video recording. (Pet. Exh. 125, para. 3). Plate is familiar with the generally accepted procedures and protocols associated with the video recording of legal proceedings. (Pet. Exh. 125, para. 3).

Plate states that when a court proceeding is videotaped, the videographer generally states their name, indicates on the record the number of the DVD, and the time at the beginning of the recording. It any point there is a break in the video record, the videographer indicates the time before going off the record, and states the time when the video restarts. The videographer also indicates when the end of the DVD is reached, and indicates the number of the DVD and the time at the beginning of the next DVD. These statements ensure that the video record is a complete record. (Pet. Exh. 125, para. 6).

[18] 48 Hours is a true crime series that is edited to present a certain storyline on a case. The program does not pretend to be objective or unbiased. At one point when Erickson is testifying the camera is focused on his shoes and legs, which are chained. At another point during Erickson's testimony the camera is focused on a stack of papers or the judge's face. The camera angles are constantly changing to make the footage more dramatic. The footage presents a distorted and inaccurate picture of what actually was seen by the jury.

Plate reviewed the DVDs numbered 13 through 19, which correspond with the trial testimony of Charles Erickson. There are no statements made by a videographer indicating the number of the DVD, and there is no verbal indication of the time. Without these statements it is impossible to determine whether the DVDs are numbered correctly in sequence, whether there is testimony missing, and how much time elapsed between each of the DVDs. (Pet. Exh. 125, para. 7). There is reason to believe that portions of the testimony are missing, as DVDs 13 and 14 begin and end in the middle of questions and answers. (Pet. Exh. 125, para. 8).

There are other difficulties with the DVDs. All of the side bars are completely muted. During portions of the video the camera is focused away from the witness, which makes audio difficult to hear at times. (Pet. Exh. 125, para. 9). Moreover, portions of the DVDs "freeze" or "skip" (Pet. Exh. 125, para. 10), or do not work at all (Pet. Exh. 125, para. 15-16). These apparently damaged portions of video make it impossible to determine what is missing from the trial. (Pet. Exh. 125, para. 13, 16).

Plate concludes that the recordings she reviewed were not made in a manner consistent with accepted protocols in the field of legal videography, how the DVDs connect due to the missing portions of testimony, and that portions of the recordings are of poor quality. (Pet. Exh. 125, para. 17-19).

No Missouri statute, Supreme Court Rule, or reported decision sanctions Judge Green's reliance on footage shot by the media and not certified as an official court record. Worse, based on Warner's and Plate's affidavits, it is clear that the video was not intended to be relied upon by a court of law to assess the trial testimony of any witness.

The fact that the video was shot only using one camera, is missing portions of the trial, has suspect audio quality, and that portions of the testimony are not viewable due to technical problems with the DVDs further undercuts the notion that the footage is a reliable method of assessing witness credibility even if it were proper for Judge Green to use the video to do so.

Other jurisdictions have rejected the notion that witness credibility may be revisited by watching videotaped testimony. For example, in Kentucky a certified copy of a video recording of the court proceeding being appealed is to be included in the record on appeal. Kentucky Court Rule 98(2)(a). However, even where the record contains an official copy of footage of the proceedings, credibility and the weight of the evidence are matters that remain within the exclusive province of the jury. *Potts v. Commonwealth*, 172 S.W.3d 345, 349 (Ky. 1999). Other jurisdictions have also rejected attempts to alter the standard of review afforded a trial court's factual determinations based on the availability of videotaped proceedings. *State v. Polnett*, 1999 WL 1054697 at *4, n. 17 (Wash. App. Nov. 22, 1999) (rejecting appellant's suggestion that the existence of a videotape alters the standard of review or permits the appellate court to give less deference to the court's findings); *Mitchell v. Archibald*, 971 S.W.2d 25, 29-30 (Tenn. App. 1998) (declining the appellant's request to reweigh the evidence and make an independent judgment regarding witness credibility because the record of proceedings is a videotape rather than written transcript).

Judge Green's assessment of Erickson's recantation vis-á-vis his review of an unofficial, incomplete and biased recording of the trial renders his ruling as to that issue

fundamentally flawed. This is particularly true in light of Judge Green's apparent misapprehension of the record and the "facts" he relied upon in rejecting Erickson's recantation.

ii. Judge Green's finding that Erickson's trial testimony is credible because he possessed knowledge of unique facts about the murder ignored undisputed facts and is wholly unsupported by the evidence

Judge Green found that Erickson's trial testimony is credible because "Mr. Erickson possessed knowledge of unique facts about the murder." (Pet. Exh. 116, p. 21). Judge Green's finding is flatly contradicted by the evidence. Judge Green cited the following "unique facts" that Erickson allegedly "possessed knowledge" of thereby confirming he committed the crime and was truthful at trial:

(1) Judge Green found that Erickson knew that the killers had told the cleaning lady to go get help, ostensibly because this is a fact that was not reported in the newspaper. (Pet. Exh. 116, p. 10). Judge Green ignored the undisputed fact that this is information the police provided to Erickson. Specifically, Detective Short was the first person to interview Erickson following his arrest. In Short's own report memorializing the interview, Short documents that he told Erickson that one of the individuals by Heitholt's car purportedly told the cleaning lady to go get help. (H.Dep. Short 51, Grp. Exh. B, p. 5) (Pet. Exh. 107). ("I told Erickson that the cleaning lady told the police that someone asked for help.")

(2) Judge Green, citing the findings of fact from Ryan's post conviction proceeding, also found that Erickson knew "which parking lot at the Columbia Tribune

where the murder occurred." (Pet. Exh. 116, p. 21). Tellingly, Judge Green did not cite to any evidence in the record to support this claim, and neither did the court presiding over Ryan's 29.15 proceedings. Perhaps that is because the undisputed police videotape in the case completely contradicts this assertion. On the day of his arrest Erickson was driven by Detective Nichols to the crime scene. En route Erickson interrupted Nichols and asked, "Can you tell me exactly where this happened?" Nichols responded, "Yes. We're gonna go right up to the parking lot." (Pet. Exh. 22, 22a). Detective Nichols later informed Erickson, "This is the parking lot," and even showed him the exact spot in which Heitholt's vehicle had been parked the night of the murder. (Pet. Exh. 22, 22a).

(3) Judge Green also inexplicably held that Erickson's trial testimony was credible because he knew the location of the victim's body on which he had been hit. (Pet. Exh. 116, p. 21). Once again, Judge Green's ruling ignores the record and is devoid of common sense. It was widely reported in the newspapers that the victim had been beaten on the head and neck with a blunt instrument and had been strangled. (Pet. Exh. 24). This was not a fact known only by the killer, but by the public at large. Furthermore, the fact that it was widely reported in the media the manner in which Heitholt was murdered corroborates Erickson's initial statements to police – as well as his recantation testimony – that his knowledge of the murder came from news accounts.

(4) Judge Green found that Erickson knew that a man had followed the suspects down the alley. (Pet. Exh. 116, p. 21). This is yet another baffling ruling, because Erickson never testified at trial that anyone followed him and Ryan down the alley. In fact, Erickson testified that he and Ryan made it to Fourth Street before he

heard "people" exit the Tribune building and start yelling. (TT 556). Likewise, Trump did not testify that he followed anyone down the alley at trial (TT 980-81), or during the habeas hearing. (HH Trump 216-17). Rather, Trump crossed the alleyway when he went to check on Heitholt by his car. (HH Trump 216-17). It is puzzling to say the least that Erickson's "knowledge" that a man followed the individual down the alley corroborates his involvement in the murder, when there is absolutely no evidence (from any source) that event took place.

(5) Judge Green found that Erickson knew the description of the dock at the Tribune. (Pet. Exh. 116, p. 21). Once again, it is troubling that Judge Green cites as facts things that are flatly contradicted by the record. As detailed, *supra*, Nichols had to show Erickson where the murder took place. Of course, after the drive-around with police Erickson would know what the dock area looked like, because the police had shown it to him. Moreover, Erickson was given all the discovery in the case, including false police reports, after his preliminary hearing was waived. (TT 856). It is difficult to comprehend how this is unique knowledge possessed by only the killer, when all of it was provided to Erickson before Ryan's trial.

(6) Judge Green found that Erickson knew where the cleaning lady had been standing. (Pet. Exh. 116, p. 22). Judge Green failed to specify how this corroborates Erickson's trial testimony when, once again, it was widely reported in the media that a cleaning lady was present and saw two individuals by Heitholt's vehicle, and anybody – including Erickson – could have been familiar with the Tribune parking lot. Furthermore, the police told Erickson about the cleaning lady, and drove him to the scene

of the murder. After they arrived at the scene, Nichols asked Erickson, "Looking at this area, does this look familiar to you and the door being right here, loading dock area?" to which Erickson replied, "I mean, I don't remember the whole – I don't remember most of what happened when it came down to it." (Pet. Exh. 22, 22a).

(7) Judge Green found it significant that Erickson knew that the victim's car door was open. (Pet. Exh. 116, p. 22). Once again, Judge Green ignores the record. Erickson never told police during his initial interviews (prior to his plea) that the car door was open. (Pet. Exh. 20-23). Erickson's first representation that the car door was open came after he had received all of the discovery in his case. This discovery included crime scene processing reports which described the blood that was found on the interior of the car. (Pet. Exh. 133).

It is noteworthy that Robert Thompson, a Tribune employee who went to check on Heitholt after Trump and Ornt reported that he might be hurt, testified that Heitholt's driver's side car door was closed when he arrived. (TT Thompson 1096, 1100). All of the crime scene processing reports and photos show the doors closed at the time police showed up to the scene. Clearly the murderer closed the car door after the attack, probably because the interior car light was on and that would have drawn attention to the car. Erickson's trial testimony never mentions closing the car door. If Erickson had testified that he and Ryan closed the car door, that would have been a unique fact. Once again, rather than supporting Erickson's testimony, Judge Green selected an example that proves the falsity of Erickson's testimony.

(8) Judge Green states in his findings that Erickson "described in vivid detail what he observed when he struck the victim with the tool" and that in one of his first video interviews with police Erickson stated he "distinctly remembered" striking the victim.[19] (Pet. Exh. 116, p. 22). Judge Green's finding ignores the repeated statements by Erickson throughout his initial interviews with police that his memory was foggy and dream-like, that he was just making assumptions based on what he read in the newspaper, and that he could be fabricating. Obviously, the finding ignores the crucial fact that in his first police interview Erickson stated he hit the victim once, not eleven times as the pathologist Adelstein testified. (TT 1414).

(9) Finally, Judge Green noted that Erickson's statement to the Department of Corrections upon his arrival to begin serving his sentence was consistent with his trial testimony. (Pet. Exh. 116, p. 22). It should come as no surprise that Erickson chose not to violate his plea agreement on the first day he began serving his sentence. Moreover, the only facts Erickson gave about the murder in that statement were that he and a friend "decided to do a robbery. Things got out of hand. I hit they [sic] guy with a tire tool, my friend strangled him and he was a sports editor for the paper." (Pet. Exh. 128, p. 2). These general and vague facts are anything but "unique."

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[19] Judge Green specifically mentioned that Erickson told police Heitholt "groan[ed]" when Erickson struck him. (Pet. Exh. 116, p. 22). Of course, there is no corroboration for this statement. It is not a unique fact that a victim might groan when repeatedly struck on the head with a metal object. It is not as though Heitholt uttered a phrase or mentioned a name unique to him that Erickson would not have otherwise known. It is a meaningless assertion without weight in assessing Erickson's credibility.

Notably, Judge Green ignores the inconsistencies and improbabilities in Erickson's trial testimony. His time would have been better served trying to explain how Erickson, 5 foot 7 in 2001, could have hit Hetiholt, standing 6 foot 4 at the time of the murder, on top of the head. Nor does he try to account for how Erickson could have run from the dumpster in front of Heitholt and somehow ended up behind Heitholt without alerting Heitholt to his presence.

iii. Judge Green's finding that Erickson's habeas testimony stating he is unable to remember the events is not credible because it is a "tardy discovery of his amnesia" is refuted by the evidence

Judge Green found that Erickson's habeas testimony that he has no memory of the murder is a "tardy discovery" of amnesia. The evidence overwhelmingly demonstrates that Erickson has been professing his amnesia of the night of November 1, 2001 since the date of his arrest on March 10, 2004. Any cursory review of the interrogation tapes, police reports, and trial testimony of Erickson demonstrates his memory problems are not a recent fabrication.

For months after first being investigated, as detailed *supra*, Erickson made numerous and repeated statements to friends, the police, his parents, and even a nurse in the jail that he was uncertain whether he and Ryan had murdered the victim, that he might be confusing memories with dreams, and that he could be fabricating his and Ryan's involvement. Erickson reported to police on March 10, 2004, when he was arrested, that he thought he may have experienced a blackout the night of the murder. (Pet. Exh. 21, 21a). He also testified at trial that from November 1, 2001 through the Spring of 2003 he had no conscious memory of being involved in Heitholt's death. (TT 846-848). The Attorney General has always admitted that Erickson has had gaps in his memory regarding the murder. Indeed, in 2006 on direct appeal the Attorney General asserted:

> Erickson's demonstrated inability to recall the event and his incomplete memories of the event left open the possibility that he was the one who took the items . . . . [T]here was substantial evidence of Erickson's intoxication at the time of the murder, and the jury might have reasonably believed that Erickson had

> experienced what is commonly known as an alcohol-induced 'blackout,' and that Erickson simply did not recall his actions.

(Pet. Exh. 120, p. 49).

In other words, the Attorney General admitted years ago that the evidence elicited at trial supports Erickson's recent recantation testimony that he suffered a blackout that night. There is absolutely no evidence to support Judge Green's finding that Erickson's amnesia was a recent fabrication for purposes of the habeas hearing, and he ignored a mountain of evidence to reach his conclusion.

iv. Judge Green's finding that Erickson's recantation is not credible because his August 29, 2011 affidavit sets out facts prior to leaving By George ignores the evidence

Judge Green stated that "Erickson's testimony appears to be that Mr. Erickson just does not remember the events from October 31 to November 1, 2011. But even the August 29, 2011, affidavit shows detailed memories by Mr. Erickson from that evening." (Pet. Exh. 116, p. 22-23). Judge Green then identifies facts from Erickson's affidavit relating to the events leading up to Erickson and Ryan going to By George and then some events at By George. (Pet. Exh. 116, p. 23).

None of Judge Green's details establish in any way that Erickson did not blackout after these events, which all occurred before 1:30 a.m. on November 1, 2001. As explained throughout this document, Erickson does not remember the murder, which occurred after 2 a.m., after nine or ten drinks, and after substantial drug use. And, as explained above, the Attorney General in 2006 admitted that a reasonable jury could have believed that Erickson suffered a blackout and has suffered a lack of memory as a result.

(Pet. Exh. 120, p. 49). Indeed, Dr. Kim Fromme, a Professor of Clinical Psychology who specializes in the effect of alcohol intoxication on cognitive processes, has testified via affidavit:

> I can say with a reasonable degree of psychological certainty that Charles Erickson was experiencing alcohol-induced blackouts during the night of October 31 to November 1, 2001, and his own report of alcohol use and hangover, combined with his initial inability to clearly recall his own behavior, is entirely consistent with the experience of alcohol-induced blackouts.

(Pet. Exh. 129, para. 14)

v. Judge Green's finding that Erickson lacked motive to testify falsely at the trial ignores facts and arguments, and is refuted by the evidence

At the habeas hearing, Erickson testified as to four motives for him to testify falsely at Ryan's trial: (1) he feared he was going to be charged with first degree murder and sentenced to the death penalty (HH Erickson 381-82); (2) he believed, based on false information produced by a fellow inmate, that Ryan would take a plea deal and testify against him (HH Erickson 303-04); (3) he was provided false police reports that Ryan had admitted to committing the crime (HH Erickson 344-46); and (4) he was told Trump would identify him as being at the scene. (HH Erickson 422).

Judge Green completely ignored the second and third reason and has made no findings regarding them. These reasons are supported by the evidence and Judge Green's ultimate finding that Erickson had no motivation to testify falsely at the trial was erroneous.

With respect to the first reason, Judge Green found that Erickson could not have been motivated by a fear of receiving the death penalty because Prosecutor Crane and Erickson's attorney, Kempton, testified that there were no discussions regarding a death sentence. (Pet. Exh. 116, p. 27). This ignores Petitioner's exhibit of televised and videotaped media reports, aired at the time of Ryan's and Erickson's arrests, wherein Prosecutor Crane stated he had not decided whether to seek the death penalty. (Pet. Exh. 112). Judge Green also determined that Erickson could not have been motivated by a fear of receiving the death penalty because "The Missouri Supreme Court had already ruled, prior to the arrest of Mr. Erickson, that 17-year-old murderers could not be executed." *State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (Mo. banc 2003)." (Pet. Exh., p. 27). This ignores, however, the fact that at the time of Erickson's plea, the U.S Supreme Court had granted Missouri a writ of certiorari, and it was not until four months after Erickson's plea that the Court affirmed the Missouri Supreme Court's holding. *Roper v. Simmons*, 543 U.S. 551 (2005). (Pet. Exh. 114).

With respect to the final reason, Judge Green held that Erickson could not have been told that Trump would identify him because "[n]o hint of being able to identify anyone was made by Mr. Trump until a month after Mr. Erickson had pled guilty." (Pet. Exh. 116, p. 28). However, the police knew that Trump was an eyewitness from the start of the investigation. It is an undisputed fact that Erickson was provided with false police reports of numerous witnesses. It is not an unreasonable inference that Erickson was told of Trump's identification prior to the Trump meeting at the prosecutor's office. In fact, telling Erickson of Trump's identification supports Petitioner's argument that the

prosecution knowingly suborned perjury when Trump testified. The prosecution knew that Trump would have to agree to their identification story because of the leverage they had on Trump, as described previously.

Significantly, Erickson's testimony that he was told Trump would identify him prior to entering into his plea agreement is not disputed by any witness. Moreover, Trump gave a deposition prior to Erickson's testimony at trial in which he testified about receiving the newspaper story and making an identification. (PT Dep. Trump, p. 42). Thus, Erickson was well aware of Trump's identification prior to testifying against Ryan.

vi. Judge Green's finding that Erickson testified at the habeas hearing in order to reduce his jail time is not supported by the evidence, ignores the fact that Erickson subjected himself to perjury charges that would extend his jail time, and ignores the fact that he was set for release in five years

Another incorrect finding by Judge Green involved Erickson's purported motivations for recanting his trial testimony:

> The Court believes that Mr. Erickson is now motivated to fabricate these recantations because of a dislike of the realities of prison life along with a hope that his release will occur once he assists in releasing Petitioner. While denials of this motivation were made, the record clearly reflects Mr. Erickson's hope and expectation that he, too, will be released. In the meantime, Mr. Erickson's time in prison is likely to be lengthened because of the difficulties from other offenders' perception of him as a snitch.

(Pet. Exh. 116, p. 28). No statement in the excerpt above is supported by the evidence, and Judge Green incorrectly defined the term "snitch" as used in Missouri case law.

First, undisputed evidence indicates that Erickson would have been released in five years if he kept quiet. By testifying that he committed perjury at Ryan's murder

trial, Erickson has committed a Class A Felony, with a possible range of punishment of not less than ten years and not to exceed thirty years, or life imprisonment. 558.011(1), RSMo. 2000. Additionally, by testifying that he lied at Ryan's trial, Erickson has arguably violated his plea agreement, potentially subjecting him to new charges and a sentence exceeding five years. Thus, Judge Green's finding that Erickson recanted his trial testimony in order to get out of prison is directly contradicted by the fact that he has subjected himself to significantly more prison time. It should be noted that Judge Green completely ignored in his findings the fact that Erickson could be charged with perjury or that he violated his plea agreement.

Second, Judge Green admits that Erickson denied that he was testifying at the habeas hearing in order to somehow be released early. Judge Green explains that away, however, by stating, "the record clearly reflects Mr. Erickson's hope and expectation that he, too, will be released." Judge Green cites no evidence in support and it is clear that there is no evidence to support this bald statement.

And third, there is no evidence that Erickson is perceived as a "snitch." On the contrary, Erickson testified that he has not been labeled a snitch since he has been incarcerated, and he has never been in a fight regarding his case. (HH Erickson 332-33). Erickson accurately testified that "snitching" on someone in prison is what results in somebody being labeled a snitch. (HH Erickson 333). The Attorney General failed to present any evidence at the habeas hearing that supported its theory that Erickson has been labeled a snitch; no fellow inmates were called to testify that Erickson is perceived as a snitch, and no prison records were admitted to that effect. Significantly, the Attorney

General in 2006 admitted that Erickson is not a snitch in its brief on direct appeal. (Pet. Exh. 120, p. 18). (stating that Erickson was not a "snitch," but rather a co-actor implicating himself in the crime). Judge Green misapplied the term "snitch" according to the 2006 Attorney General brief, which defines the term as being inapplicable to Erickson.

vii. Judge Green's finding that Kempton was always present at meetings with prosecutor Crane and Erickson is refuted by Kempton and Crane's testimony

Judge Green found that Erickson testified falsely when he stated that he met with Prosecutor Crane and Haws several times without his attorney present because, according to Judge Green, "Mr. Kempton testified that this was not true and that he was present at all meetings." (Pet. Exh. 116, p. 20). Judge Green completely ignored the evidence in the record that completely contradicts this assertion.

Mr. Kempton testified that he does not recall if he was at each "prepping" session of Erickson by Prosecutor Crane. (HH Kempton 639). However, Prosecutor Crane recalled that Kempton was not present at each session. Prosecutor Crane admitted, "I can't remember exactly how many times I met with Erickson. The last time I met with Mr. Erickson prior to the trial, was after voir dire and between the time the trial started. And at that meeting my investigators were there, but Mr. Kempton wasn't," and Crane further stated, "Let's say I met with Mr. Erickson maybe four times that I can kind of recall. I would say Mr. Kempton was there two or three, and it may have been he wasn't there through the entire time that I talked to Erickson." (HH Crane 586-587).

Most significant, however, is the undisputed fact that Kempton was not even present when Erickson gave his pre-trial deposition. (Pet. Exh. 109). This was perhaps the single most important meeting between the prosecution and Erickson, yet Kempton did not appear to represent his client.

2. Judge Green made many factual errors in determining that Trump's testimony regarding Prosecutor Crane was not credible

Judge Green made two confounding findings with respect to Trump. First, he found that Trump's trial testimony, while completely perjured, did not matter in Ryan's conviction. Second, after appropriately finding that Trump came into a court of law and credibly admitted that he committed perjury at a prior proceeding, Judge Green found that Trump then, in the same court of law, committed perjury *again* by lying about Prosecutor Crane's involvement in the fabrication of Trump's trial testimony. As explained above, the first finding (Trump not material) is contradicted by well-established law. The second holding (Trump is lying about Crane's involvement) is simply not supported by the evidence or the law.

i. Judge Green's finding that Trump lied about government involvement in his perjured testimony is refuted by common sense, the evidence in this case, and Judge Green's own findings

As discussed above, Trump testified at trial that he received a newspaper clipping in the mail from his wife while in prison, and from that newspaper clipping he was able to identify Ryan. Trump now admits this was a lie. And, because of the overwhelming evidence in support, Judge Green has agreed, stating that Trump's newspaper story was "too fantastic to be believed." (Pet. Exh. 116, p. 17). Judge Green also found, however,

that Trump lied about Prosecutor Crane showing him a newspaper article and encouraging him to identify Ryan. (Pet. Exh. 116, p. 31). If one were to accept Judge Green's holdings, then Trump told Prosecutor Crane a story that was "too fantastic to be believed," and Prosecutor Crane, a then county prosecutor and now circuit court judge, *believed* this unbelieveable story and *presented* it to a jury. Clearly this finding by Judge Green is very damaging to Prosecutor Crane. This is a story that is "too fantastic to be believed." Moreover, Judge Green's holding that Trump has admitted perjury while committing additional perjury defies common sense and logic.

Significantly, Judge Green sought to provide an explanation for Trump's perjured testimony at Ryan's trial, despite the fact that the Attorney General did not. Judge Green speculated as follows: "Whether motivated by a perceived need for a probationer to ingratiate himself to law enforcement, a desire to be in the public limelight, or some other reason known only to him, Trump's identification of Ferguson at trial was false." (Pet. Exh. 116, p. 17). Judge Green's imputation of a motive to Trump is particularly troublesome in light of the fact that the Assistant Attorney General Ted Bruce admitted "I can't explain the motive of Mr. Trump" to testify as he did at the habeas hearing. (HH Bruce 742).

Judge Green ignores the fact that Trump has presented an entirely reasonable explanation: Prosecutor Crane, a law enforcement officer of influence, worked with Trump to create the trial testimony. This explanation is made all the more credible considering, *inter alia*, (1) Prosecutor Crane's office initiated contact with Trump, (2) Prosecutor Crane's knowledge that Trump had initially told law enforcement he could not

identify either individual, and despite that fact, Crane still wanted Trump to come to his office,[20] (3) Prosecutor Crane's own investigator learned from Trump's wife that she had not sent Trump any newspaper clipping, (4) the newspaper story originally stated by Trump, which is undeniably false, aligned perfectly with *State v. Lawrence*, and Prosecutor Crane undoubtedly wanted to avoid any admission of government involvement so that Ryan would not be able to challenge the admissibility of Trump's identification, (5) prior to meeting with Haws and Prosecutor Crane, Trump not only could not make an identification, he also could not assist in creating a composite sketch, and (6) prior to Trump's identification, the only evidence connecting Ryan to the murder was Erickson's implausible and highly impeachable story. In short, Prosecutor Crane needed a credible witness to corroborate Erickson's incredible testimony.

ii. Judge Green's finding that Trump's habeas testimony regarding Prosecutor Crane was motivated by an attempt to avoid perjury charges is contradicted by fact and law, and Judge Green ignored the fact that Trump's habeas testimony is reliable and credible because he subjected himself to perjury

Like Erickson, Trump acknowledged that by testifying that he lied at Ryan's murder trial, he could be prosecuted for perjury, which is a Class A Felony, with a possible range of punishment of not less than ten years and not to exceed thirty years, or life imprisonment. 558.011(1), RSMo. 2000. Judge Green ignored this significant indicator of reliability.

[20] At the habeas hearing Prosecutor Crane admitted he had been to the murder scene at least one time. (TT 609). Prosecutor Crane should have instantly realized the Trump identification was impossible, given the distance and the lighting.

Instead, Judge Green determined that Trump testified that Prosecutor Crane encouraged him to identify Ryan "in an effort to avoid prosecution for perjury." (Jg. Green's Ruling, p. 30). Judge Green cites no authority of law indicating that a person may circumvent the laws of perjury by saying someone else told him to do it. This is because the law states the exact opposite: where a person suborns the perjured testimony of another, "[e]ach is guilty of a separate crime." *State v. White*, 263 S.W. 192, 194 (Mo. 1924). Therefore, Trump "shifting the blame" to Crane would not impact the State's ability to bring perjury charges against Trump.

Second, if one were to believe Judge Green's findings, then Trump attempted to avoid perjury charges by committing perjury. This makes no sense. Ultimately, Trump testified that he committed perjury at Ryan's trial and he is willing to live with the consequences. There is no evidence that he now seeks to skirt the perjury laws of Missouri. Instead, all he seeks is forgiveness from Ryan.

iii. Judge Green's finding that Trump's habeas testimony was not credible because he did not initially come forward with all the information in one affidavit ignores Trump's reluctance to disclose Prosecutor Crane's involvement in Trump's false identification of Ryan

Judge Green apparently found Trump's testimony regarding Prosecutor Crane not credible because, in part, Trump's "accusations against Crane by Mr. Trump have increased on every occasion." (Pet. Exh. 116, p. 16). Trump testified in court, under oath, as to Prosecutor Crane's role in his trial testimony. That testimony was consistent with his freely signed affidavits. Trump's testimony admits criminal liability in the form of perjury, a Class A felony. Trump's testimony implicates a state court judge in

significant impropriety. There is no possible advantage to Trump in making this accusation.

It is reasonable to believe that Trump, a convicted sex offender, would hesitate to admit by affidavit that he committed perjury and would also hesitate to implicate an elected official in wrongdoing. In fact, Trump explained his initial hesitation to accuse Prosecutor Crane of suborning perjury, stating that he was "frightened" and "trying to get past all of it," and knew he himself could be charged with perjury. (HH Trump 233). Trump further testified that he did not want to tell anyone about Prosecutor Crane's actions "because of fear of being in trouble with Mr. Crane." (HH Trump 247). As explained by Investigator Kirby, an investigator of over 40 years who has conducted over 10,000 witness interviews, "witnesses seldom tell the whole truth during the first interview, as they are often afraid of repercussions." (Pet. Exh. 126, para. 19). Judge Green mistakenly believed that Trump could avoid responsibility for his perjured trial testimony by blaming Prosecutor Crame. The law is contrary to Judge Green's assessment of Trump's motive.

iv. Judge Green's finding that Trump's truthful testimony would have corroborated Erickson's trial testimony ignores the significant contradictions between Erickson's and Trump's explanations of the night of the murder

Judge Green held that "[i]f Mr. Trump had testified truthfully at trial, his testimony would have been merely that he saw two teenage white males at the scene and nothing more," which "would have been corroborative of Erickson's testimony." (Pet. Exh. 116, p. 31-32). This wholly ignores the fact that if Trump testified truthfully, he

would have testified to many additional facts that would have severely undermined and contradicted Erickson's testimony. For example:

(1) Trump never heard one of the two individuals by Heitholt's body say "go get help" or anything like that (H. Dep. Trump, 75; Trump Affidavit, par. 8), but Erickson testified that he called out "[t]his man's hurt. Go get help" to the people at the Tribune building. (TT 553).

(2) Trump testified that the two individuals were 6 feet tall (TT 1033), but Ryan and Erickson were much shorter, about 5 foot 7 inches. Trump also described the two individuals as about 19-20 years old (TT 1049), but Ryan and Erickson were 17 at the time.

(3) Trump testified that when he went to check on Heitholt, he crossed the alley and saw the individuals walking up the alley (TT 978), but Erickson testified that he did not hear anyone come back out of the Tribune building until after he and Ryan had made it to Fourth Street (TT 554-556), which would have been beyond the view of Trump.

(4) Trump testified that neither of the individuals he saw was wearing a sweatshirt (TT 1047), but Erickson testified that he was wearing a sweatshirt (TT 518).

(5) Trump testified that he told the cops and reported in the 911 call that the two individuals he saw were wearing jackets (TT 1059), but Erickson testified that he and Ryan left their jackets in the car (TT 517-518).

(6) Trump testified that he told police that the individual toward the back of the car had a baseball cap on and he testified that "he still sort of remembers that" (TT 1055), but Erickson never testified that he or Ryan was wearing a cap.

(7) Trump testified that the individual towards the rear of the car had darker hair (TT 1047), but Erickson testified that when people came out of the Tribune building he was toward the front of the car and Ryan (who had lighter hair) was toward the rear (TT 555).

In light of all these inconsistencies, it cannot be said that Trump's truthful testimony would have corroborated Erickson's trial testimony. In fact, without the identification, Trump's truthful testimony would have contradicted Erickson's and corroborated Ryan's.

3. Judge Green's assertions that Ryan's counsel or agents somehow coerced the witnesses into recanting their trial testimony is wholly without evidentiary support and contrary to the evidence

Judge Green made repeated negative reference to the actions of Ryan's counsel, Kathleen T. Zellner & Associates,[21] and counsel's investigator, Steve Kirby.[22] As explained in greater detail below, Judge Green implies, and flat out states, that these parties somehow coerced Erickson and Trump, two adults, to recant their trial testimony.

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[21] In August 2012, Ms. Zellner was presented the American Bar Association TIPS "Pursuit of Justice Award," which recognizes lawyers and judges who have shown outstanding merit and who excel in providing access to justice for all. Ms. Zellner has an AV-Pre-eminent rating, recognizing the highest legal and ethical standards. Her firm has obtained the release of 13 wrongfully convicted inmates in the last 21 years. The National Law Journal selected Ms. Zellner as the 2002 Pro Bono Attorney of the Year in the United States. Her firm represents Ryan on a pro bono basis. It is an absurd accusation that Ryan's pro bono attorneys have anything to gain by colluding with Erickson and Trump.
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[22] Mr. Kirby has been a licensed investigator since 1975. He has interviewed and/or interrogated in excess of 10,000 witnesses or suspects in a variety of investigations. Mr. Kirby has served as president or board member of a number of investigative organizations. He has been judicially appointed as Chief Investigator in a major investigation regarding official misconduct and perjury, and he has conducted internal investigations for the police. Mr. Kirby assists in Ryan's case pro bono, only being reimbursed travel expenses. (Pet. Exh. 126).

i. Charles Erickson

Without consideration of the facts in evidence, Judge Green bluntly stated, "[Erickson's] recantation occurred under circumstances that are far, far away from being free from suspicion of undue influence or pressure from any source. Moreover, the record discloses a possibility of collusion (perhaps implied but nonetheless present) between defendant (or his agent(s)) and this witness between the time of trial and the retraction." (Pet. Exh. 116, p. 29).

Significantly, Judge Green provides a time-frame of the alleged collusion: "between the time of trial and the retraction." (Pet. Exh. 116, p. 29). This time period is from 2005 to November 20, 2009, which amounts to 48 months (about 1440 days). Kathleen T. Zellner & Associates, Ryan's current attorneys with local Missouri counsel, represented Ryan for 1 day of those 1440 days. A total of 6 Missouri attorneys represented Ryan during the time period identified by Judge Green: Charles Rogers, Jeremy Weis, Kathryn Benson, Ellen Flottman, Valerie Leftwich, and Janet Thompson.

Additionally, Erickson freely recanted his trial testimony without contact from any agent of Ryan. On November 20, 2009, Erickson wrote a retraction of his trial testimony. (Pet. Exh. 34g). Two days later, Ryan's counsel made contact with Erickson for the first time. At that time, Erickson read a previously prepared handwritten statement before a court reporter and videographer.[23] (Pet. Exh. 34j). Erickson's final and most comprehensive and detailed affidavit was composed by Erickson in his prison cell,

[23] With respect to subsequent affidavits, Erickson testified that he carefully reviewed each one and asked that certain paragraphs be removed and certain additions be made. (HH. Erickson 324; Pet. Exh. 34e).

without the aid or advice of any attorney, although he was represented by separate counsel, John O'Connor. (Pet. Exh. 34a). Mr. O'Connor provided this final 20 page affidavit to both sides shortly before the habeas hearing. Erickson testified under oath that he lied at Ryan's trial. He testified that his testimony was freely given and subjected him to potential perjury charges. There is simply no evidence of collusion or coercion.

ii. Jerry Trump

In discussing the recantation of Trump, Judge Green directly and indirectly claims that Kirby somehow created the story for Trump, a story that Judge Green believes is largely true. (Pet. Exh. 116, p. 15, 29-30). Trump has never testified that Kirby influenced his habeas testimony or coerced him to recant his trial testimony. In fact, the record clearly indicates the opposite. Trump testified that he initially turned Kirby away, at which point Kirby left a business card. (H. Dep. Trump 25). Thereafter, Trump contacted Kirby. (H. Dep. Trump 25-26). Over the next several weeks, Trump provided information summarized in two affidavits. (Pet. Exh. 2; Pet. Exh. 3). Trump reviewed and signed each affidavit freely (H. Dep. Trump 9-10, 15-17), and he testified openly and freely under oath in a court of law consistent with those affidavits (HH Trump 203-263). Thus, the record is clear that Kirby did not coerce or unduly influence Trump's testimony in this case. Kirby has submitted an affidavit of his own outlining his interactions with Trump. (Pet. Exh. 126). This too evidences a complete lack of impropriety on the part of Kirby, who has over 40 years of experience in his field.

A review of Judge Green's reasoning in reaching a contrary conclusion further crystallizes his errors. First, Judge Green states that Trump's statement in his first

affidavit that he has "had the opportunity to reflect upon the events that occurred in the early morning hours of November 1, 2001" is not true because, according to Trump, Kirby "contacted Trump and encouraged him to prepare one affidavit and then another." (Pet. Exh. 116, p. 15). This statement makes little sense, as nothing in it refutes the fact that Trump had almost nine years to reflect on the events of November 1, 2001. Additionally, the record is clear that Trump's affidavits were drafted *after* Trump re-initiated contact with Kirby.

Second, Judge Green states, "There are items in the [first] affidavit that cannot reasonably be attributed to Mr. Trump. The most obvious example is in paragraph 8 where Mr. Trump states he told Christine Varner he could not identify anyone; yet, Mr. Trump did not even know who Ms. Varner was. (Trump 2012 depo, pgs. 11 , 61, 62)." (Pet. Exh. 116, p. 15). This is a factual error. At the time he issued the affidavit, Trump *did* know who Ms. Varner was, as he had seen her on his computer. (H.Dep. Trump. 62).

Third, Judge Green states, "Though the second affidavit states it was written because Mr. Trump wanted to supplement his first affidavit, that too is incredible. Mr. Trump testified that he felt no need or desire to prepare a second affidavit. It was Mr. Kirby who wanted this second affidavit." (Pet. Exh. 116, 16). This statement is confounding. <u>If Trump did not want to supplement his first affidavit then he would not have signed the second one.</u> Additionally, attorneys and/or investigators commonly draft affidavits for witnesses to submit their testimony in a court of law, as witnesses are not generally familiar with the format and content required by courts. Affiants review the statements and then sign them, adopting them as their own, which is what was done here.

Finally, as explained above, it is hardly surprising that Trump did not desire to create a document admitting a crime and implicating a judge (Crane) in wrongdoing.[24]

In sum, Judge Green's veiled and not-so-veiled attacks on Kirby are without merit and contrary to the evidence. What is completely illogical about Judge Green's ruling is that, if one accepts Judge Green's characterizations, Trump's first affidavit is credible and truthful despite Kirby's "visits [to] Mr. Trump on several occasions (by telephone and in person)," but Trump's subsequent affidavit is not credible because of Kirby's "repeated visits to Mr. Trump." (Pet. Exh. 116, p. 30). Judge Green ignores the obvious collusion between the State and the witnesses but has found that Prosecutor Crane presented the obviously false newspaper story to the jury. Additionally Prosecutor Crane presented Erickson's clearly false wallet story to the jury. The wallet was at the scene and not at Ryan's house as Erickson testified to after being prompted by Prosecutor Crane to tell this false story to the jury. These examples are verifiable in the trial transcripts and not based upon vague unsupported innuendos.

4. Judge Green's finding that Ryan did not establish a *Brady* violation is not supported by the weight of the evidence

As set forth, *supra*, Ryan has established three distinct *Brady* violations. Judge Green ignored the evidence in denying Ryan's due process claim.

i. Barbara Trump

Judge Green failed to address Ryan's argument that the prosecution did not disclose Barbara Trump's statement that she did not recall sending a newspaper article

[24] It is certainly hard to fathom why Ms. Zellner or Mr. Kirby would want to take on the task of accusing a sitting judge of suborning perjury, unless it was supported by the evidence. Judge Green fails to articulate what possible advantage would be gained by them taking on such a difficult and unpleasant endeavor.

about the Heitholt murder to Jerry Trump. Mrs. Trump's testimony would have destroyed the credibility of the identification made by Trump, which was the linchpin of the State's case against Ryan. The evidence was clearly impeachment, and should have been disclosed to the defense. This evidence places the whole case in a different light, which undermine confidence in the verdict.

Again, it must be emphasized that the **evidence of this *Brady* claim is undisputed.** Haws testified to the content of the interview and admitted he never drafted a report reflecting what Mrs. Trump told him. Thus, no credibility determinations are required to conclude that this *Brady* violation occurred. Because Trump was the key witness against Ryan, the failure to disclose the impeachment evidence "worked to [his] actual and substantial disadvantage" and "infect[ed] his entire trial with error of constitutional dimensions." *Nixon v. Jaynes*, 63 S.W.3d 210, 215-16 (Mo. 2002) (quoting *United States v. Frady,* 456 U.S. 152, 170 (1982)). Here, the State's failure to disclose Mrs. Trump's impeachment evidence requires relief in and of itself.

ii. Michael Boyd

Judge Green found, "Mr. Boyd's testimony contributed nothing to the real issue(s) in this matter and his entire testimony is immaterial." (Pet. Exh. 116, p. 11). Judge Green ignored significant material evidence in reaching this conclusion. The most glaring error is Judge Green's description of the timeline which leads him to the conclusion that if the two boys committed the murder after 2:20 a.m. when all of the employees and 911 crew and the Columbia police were on the scene because it is an undisputed fact that the murder took 6 to 8 minutes. Judge Green cannot accept the timeline testified to by

Michael Boyd because he cannot accept that the two boys were not present when the murder occurred. Ornt arrives on the parking lot at about 2:20 a.m. and the murder is over. As explained *supra*, Boyd was the last known person to see Heitholt alive; he provided inconsistent statements to police regarding his interaction with Heitholt the night of Heitholt's death; he has since revealed that he and Heihtolt had a dispute regarding an assignment prior to Heitholt's death; evidence exists that he left the Tribune building before Heithholt and waited in the parking lot until Heitholt exited; he has provided inconsistent statements about what car he was driving that night, and one of his cars has since been destroyed; Boyd never revealed to police that he returned to the crime scene a couple hours after the murder occurred and testified that Heitholt's body was face down; and the police have never tested Boyd's DNA, recovered his clothes, or compared his fingerprints and shoe prints to those found at the scene of the murder.

For all these reasons, the failure to disclose a report that would have permitted the defense to directly link Boyd to the murder was clearly material, and Judge Green erred by ruling otherwise.

iii. Kim Bennett

Judge Green reviewed Bennett's testimony noting that she testified she was "100% certain of what she saw." (Pet. Exh. 116, p. 25). Perhaps recognizing her testimony was unrebutted, Judge Green concluded:

> her credibility on [the *Brady*] issue is not necessary to resolve this claim. Under the prejudice prong of the *Brady* analysis, this claim is denied. Ms. Bennett's testimony would be inconsistent with the evidence at trial, including Petitioner's own testimony, and would not have been helpful to the defense.

(Pet. Exh. 116, p. 26).

The entirety of Judge Green's finding that Bennett would have contradicted the evidence at trial is his apparent belief that Bennett's habeas testimony conflicted with the evidence regarding the location where Ryan's car was parked. (Pet. Exh. 116, p. 25). However, Bennett testified that the car was parked on First Street in the exact location as described by Erickson during his proffer:

> Erickson stated Ferguson parked on North First Street facing north on the east side of the road. He stated he parked just south of East Walnut on the west side of the Mizzou Credit Union parking lot.

(Pet. Exh. 127). This Columbia Police Department report reflects that from the outset Erickson described the location of the parked car precisely as Bennett described the location at the habeas hearing. (HH Bennett 498). The diagram Bennett drew also makes that clear. (Pet. Exh. 47).

Through his questioning of both Erickson and Ryan, Prosecutor Crane appeared preoccupied with attempting to establish that the car was parked at the corner of First and Ash. (TT 1824-1825). Both Ryan and Erickson initially testified they parked near the bar. But Prosecutor Crane was not satisfied when Erickson testified they parked "on the right side of the road" "down past Georges." (PT Dep. Erickson 167) (Pet. Exh. 109). When Prosecutor Crane attempted to move the car further away to the corner of First and Ash, Erickson responded "It wasn't quite that far." (PT Dep. Erickson, 168) (Pet. Exh. 109). Ryan simply stated he had assumed he parked where he always parked. (TT

1825). As with Erickson, Prosecutor Crane sought to move the car down the street and Ryan simply responded "in that area." (TT 1825).

At the time of the trial, the reason for Prosecutor Crane's preoccupation with placing Ryan's car at the corner of First and Ash was not apparent. But now, Bennett's habeas testimony divulges Prosecutor Crane's motivation. During the trial, Prosecutor Crane knew of the undisclosed information Bennett had provided to the Columbia Police. Therefore, he wanted to elicit trial testimony from Erickson and Ryan that would contradict the information Bennett gave the police in case Bennett's undisclosed information was ever disclosed.

Bennett's undisclosed information is very important. Ryan, Erickson and Bennett do not contradict each other as to where the car was parked. Bennett's unrebutted habeas testimony was that she saw Ryan and Erickson enter the car and leave without delay. Judge Green drew an unreasonable and incorrect conclusion in straining to find Bennett's testimony immaterial and erred in discarding Bennett's habeas testimony based on his incorrect interpretation of previous testimony.

Bennett's testimony was exculpatory and it also impeaches Erickson's trial testimony. Ryan and Erickson did not obtain a weapon from the trunk and leave to kill someone. They left in the car after the bar closed. (TT 1785-86) (HH Bennett 465-466; 469-470).

Judge Green further wrote that "the Court has doubts about the veracity of Ms. Bennett's claim that she told the police this information." (Pet. Exh. 116, p. 26) There is no basis for that doubt. He also wrote that Ryan's father contacted Bennett after the trial.

(Pet. Exh. 116, p. 25). While this is true, no evidence of any misconduct existed, or was presented. Finally, as to the value of Bennett's testimony to Ryan's trial attorney, Judge Green wrote "Mr. Rogers does not say he was unaware of her testimony in his affidavit, only that the prosecution did not provide it to him." (Pet. Exh. 116, p. 39). This conclusion is perplexing and defies logic, because Mr. Rogers unequivocally stated that had Bennett's information been disclosed to him, he would have considered it of crucial importance to the defense and presented her testimony at the trial. (Pet. Exh. 113, para. 15-24).

CONCLUSION

WHEREFORE, Petitioner, Ryan Ferguson, requests that for all the foregoing reasons advanced in his Petition, this Court issue a writ of habeas corpus discharging Petitioner from his unconstitutional convictions and sentences with prejudice, or grant any and all other relief deemed appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, as attorneys for Petitioner, hereby certify that on the 30th day of January, 2013, a true and correct copy of the foregoing Petition for Writ of Habeas Corpus, with Writ Summary, Exhibit List, and supporting Exhibits was mailed, postage prepaid, to:

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